

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





# 74-1279

only  
P.P.

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## United States Court of Appeals

FOR THE SECOND CIRCUIT

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Docket No. 74-1279

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JORDAN BROWN and all others similarly situated,  
*Plaintiff-Appellee*  
*against*

FIRST NATIONAL CITY BANK,  
*Defendant-Appellant*

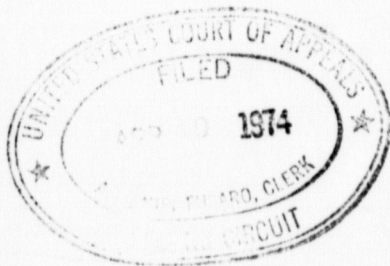
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On Appeal from the United States District Court  
for the Southern District of New York

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### JOINT APPENDIX

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SHEARMAN & STERLING  
*Attorneys for Defendant-  
Appellant*

First National City Bank  
53 Wall Street  
New York, New York 10005  
(212) 483-1000

SHELDON V. BURMAN  
*Attorney for Plaintiff-  
Appellee*

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# DOCKET ENTRIES

## UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JORDAN BROWN, and all others  
similarly situated,

Plaintiff,

*versus*

FIRST NATIONAL CITY BANK,

Defendant.

Civil Action

File No. 72 Civ. 4516

<i>Date</i>	<i>Proceedings</i>
Oct. 24-72	Filed Complaint. Issued Summons.
Nov. 6-72	Filed summons with marshal's ret. Served First National City Bank by Bernard J. Martin, Asst. V.P. on 10/26/72.
Nov. 13-72	Filed ANSWER to complaint.
Nov. 29-72	Filed First Amended ANSWER to complaint.
Dec. 6-72	Filed Demand for Answers to Interrogatories.
Dec. 6-72	Filed Notice to Produce.
Dec. 15-72	Filed deft's notice of motion Re: summary judgment. ret. 12-29-72.
Dec. 15-72	Filed deft's memorandum of law in support of motion for summary judgment.
Dec. 19-72	Filed Stip and Order that deft's time to answer plttf's interrogs. is extended from 1-4-73 to 1-31-73 and that deft's time to respond to plttf's notice to produce is extended from 1-4-73 to 1-31-73. MacMAHON, J.

## DOCKET ENTRIES

<i>Date</i>	<i>Proceedings</i>
Feb. 1-73	Filed Notice of Motion Ret. 2/16/73 at 2:15 P.M. before Duffy, J. re: Class Action.
Feb. 1-73	Filed Plaintiff's Memorandum of Law in support of motion to determine class action.
Feb. 6-73	Filed stipulation and order adjourning sine die the motion re: determine class action, until after a sub determination of deft's. motion for an order granting summary judgment to defendant, etc. So ordered. Duffy, J.
Feb. 8-73	Filed Plaintiff's Affidavit in support of cross-motion.
Feb. 8-73	Filed Memorandum of Law in opposition to deft's. motion for summary judgment and in support of pltf's. cross-motion for partial summary judgment.
Feb. 15-73	Filed Response to Request for Production of Documents.
Feb. 15-73	Filed Answers and Objections to Interrogatories.
Nov. 8-73	Filed Opinion #39990: this is one of two actions brought simultaneously by customers of the deft First National City Bank challenging the bank's method of calculating interest on checking plus accounts. The deft has moved for summary judgment in both cases: This Court denied one of the motions, finding disputed issues of fact. The pltf opposes the defts motion for summary judgment on the questions of compounding interest and charging interest on service and maintenance charges, etc. De-

## DOCKET ENTRIES

*Date**Proceedings*

fendant's argument implies that it is irrelevant whether or not the plttf ever used the entire amount loaned, since the money was placed at plttfs disposal. It is difficult to see how the mere transfer of money from one account to another can create a right to charge interest on it before it is actually withdrawn by the borrower. In view of the strict public policy underlying usury laws and the carefully drawn language limiting the imposition of interest to amounts loaned by means of honoring one or more checks or other written orders or requests of the borrower," the defts argument is not persuasive. Although admittedly customers might find it more convenient to repay their loans by making deposits in their checking accounts rather than having to make special payments to their Checking Plus accounts, the statute does not confer any legal right to make such convenience. The defendant is therefore entitled to judgment on this issue., Settle Order on Notice. Duffy, J.

Jan. 29-74      Filed Order—granting summary judgment to plttf. with respect to Counts I, III and IV of the complaint—that debt's motion for summary judgment is granted dismissing that portion of plttf's claim as alleges (Complaint, para. 14(b) that debt's motion for summary judgment dismissing that portion of plttf's claim as alleges (Complaint, para. 14 (c)—that debt's motion for

## DOCKET ENTRIES

<i>Date</i>	<i>Proceedings</i>
	summary judgment is denied in all other respects and that plttf's cross motion for summary judgment is denied in all other respects. DUFFY, J. (m/n)
Jan. 31-74	Filed deft's notice of appeal from order granting summary judgment and an injunction dated 1-28-74 as grants plttf. summary judgment and enjoins deft. as indicated. Entered on docket 1-31-74. Mailed copy to: Jordan Brown c/o Sheldon V. Burman.
Jan. 31-74	Filed undertaking for costs on appeal—National Surety Corp.
<i>Date</i>	<i>Filings—Proceedings</i>
Feb. 14-74	Filed second amended ANSWER.
Feb. 14-74	Filed plttfs Affidavit & Notice of Motion for an order compelling deft to answer the interrogatories and to produce the documents set forth in the affidavit etc. as indicated rtble. 1-19-74 before Duffy, J.
Feb. 14 74	Filed plttfs memorandum of law in support of motion to compel answers to interrogatories and production of documents.
Feb. 15-74	Filed defts Affidavit & Order to show cause why an order should not be entered staying further proceedings with respect to plttfs motion for a class determination etc. as indicated rtble 2-19-74. To LASKER, J.



## DOCKET ENTRIES

<i>Date</i>	<i>Filings—Proceedings</i>
Feb. 15-74	Filed defts memorandum in support of motion to stay determination of pltffs motion for determination of a class. To LASKER, J.
Feb. 22-74	Filed pltff's affdvt. of Sheldon V. Burman in opposition to deft's application for a stay of pltff's motions for class action determination and to compel discovery. (To LASKER, J.)
Feb. 25-74	Filed deft's reply affdvt. by Joseph T. McLaughlin to pltff's affdvt. by Sheldon V. Burman dated 2-21-74.
Feb. 27-74	Filed pltffs Affidavit & Notice of Motion for an order dismissing defts Second Amended Answer to the complaint, before Duffy, J. rtble 3-12-74.
Feb. 27-74	Filed undertaking for costs on appeal in the sum of \$250.00—Fidelity and Deposit Company of Maryland.
Feb. 27-74	Filed notice that the record on appeal has been certified and transmitted to the USCA this date.
Feb. 27-74	Filed pltff's notice of cross appeal from so much of decretal paragraph number "4" of the Order dated 1-28-74 which order was entered on 1-29-74, as denies injunctive relief to plff's cross motion for summary judgment. Copy mailed to: Shearman & Sterling. Entered 2-28-74.

## DOCKET ENTRIES

<i>Date</i>	<i>Filings—Proceedings</i>
Feb. 27-74	Filed memo endorsed on show cause order filed 2-13-74. Deft's motion staying further proceedings with respect to plttf's motion for a class determination is denied. Deft's motion under Rule 26(c) for a protective order staying discovery pending appeal is referred to Hon. Sol Schreiber for review and recommendation to Judge Duffy. It is so ordered—LASKER, J. (mailed notices)
Mar. 11-74	Filed deft's affdvt. by Joseph T. McLaughlin in response to motion to dismiss counter-claim.
Mar. 11-74	Filed deft's memorandum in response to plttf's motion to dismiss the second amended answer and, in the alternative, in support of a motion for permission to serve a supplemental answer pursuant to 13(e).

**Complaint**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN, and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

**CLASS ACTION**  
**Plaintiff Demands**  
**Trial by Jury**

Plaintiff, by his attorney, SHELDON V. BURMAN, alleges the following upon information and belief, except for paragraphs "6" through "8", inclusive, which are alleged on knowledge:

1. This is an action to recover usurious interest exacted by defendant from the plaintiff and the class he represents, based upon:

- (a) violation of the National Bank Act (12 U.S.C. Sec. 85, 86) (Count I);
- (b) Breach of contract (Count II);
- (c) Money had and received (Count III); and
- (d) Unjust enrichment (Count IV).

2. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1337, 28 U.S.C. Sec. 1355 and the doctrine of pendent jurisdiction.

3. Defendant, FIRST NATIONAL CITY BANK ("CITIBANK") is a national bank existing under federal

*Complaint*

charter and subject to the provisions of the National Bank Act ("ACT").

4. CITIBANK is located within the State of New York and the venue herein is based upon 12 U.S.C. Sec. 94.

5. Class Action Allegations:

- (a) A class action is alleged pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure; Rule 23(b)(2); or in the alternative, pursuant to Rule 23(b)(3).
- (b) The class consists of all persons who now have, or have had, checking accounts with CITIBANK and who have also entered into "Checking Plus" Credit Agreements with CITIBANK.
- (c) Plaintiff is a member of said class; his claims are typical of the claims of the alleged class members; and he can fairly and adequately protect the interests of the class.
- (d) The common questions involved include: whether usurious interest is exacted by CITIBANK from plaintiff and the other class members in violation of the National Bank Act; whether defendant violated its contract with plaintiff and the class members by its method of computing interest charges.
- (e) The class consists of tens of thousands of persons; the precise number of class members is not known to plaintiff and is within the exclusive knowledge of defendant.
- (f) With respect to proceeding under Rule 23(b)(1), an adjudication with respect to plaintiff would, as a practical matter, be despositive of the interests of the other class members, and prosecution of the interests of the other class members, and prosecution



*Complaint*

of separate actions would create a risk of inconsistent or varying adjudications.

- (g) With respect to proceeding under Rule 23(b)(3), questions of law and fact common to the members of the class predominate over any questions affecting individual members, and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

## COUNT I

6. The named plaintiff has a checking account with CITIBANK and also has entered into a Checking Plus Credit Agreement with CITIBANK. The Checking Plus account allows overdrafts in an agreed maximum amount to be drawn on the customer's checking account.

7. In connection with plaintiff's account, plaintiff made various overdrafts, made various payments in reduction thereof and had interest charges imposed against his account in the alleged unlawful manner, more particularly described below.

8. CITIBANK furnished plaintiff with monthly statements setting forth the details of the previous month's loans, payments and interest charges.

9. These monthly statements reveal that CITIBANK exacts interest charges not only on the "unpaid principal amount", mandated by statute, but rather on multiples of \$100.00 not actually loaned, plus accrued interest thereon, check maintenance charges and check service charges.

10. To illustrate: for the month ending September 27, 1972 the named plaintiff drew checks against his account causing it to be overdrafted to the extent of \$128.50. The plaintiff's Checking Plus account was charged with \$200.00,

*Complaint*

and interest exacted on this amount, although only \$128.50 had actually been loaned to plaintiff. In addition thereto, daily interest is computed: (i) on balances which include interest imposed from previous periods, thereby compounding interest; and (ii) on the service charge per check drawn on plaintiff's checking account and on the monthly maintenance charge thereon.

11. New York Banking Law, Sec. 108, subd. 5, provides, in relevant part, that interest may be charged and computed on such loans or advances, as follows:

"may charge interest on such loans and advances at the rate permitted by paragraph (b) of this subdivision." (subd. (a))

\* \* \*

"at a rate not in excess of one percentum per month, as computed pursuant to this section, reckoned on each loan or advance from the date thereof, calculated on any of the following bases: (i) on the unpaid principal amount of such loans and advances from time to time outstanding . . ." (subd. (b))

12. The National Bank Act, (12 U.S.C. Sec. 85) prohibits a National Bank from charging interest that exceeds "the rate allowed by the laws of the State . . . . . where the bank is located," except where the rate is no more than "one per centum in excess of a discount rate on ninety-day commercial paper . . ."

13. The interest rates of CITIBANK on their "cash reserve loans" have always exceeded the discount rate on ninety-day commercial paper by more than one per centum.

14. CITIBANK'S method of computing interest charges violates New York Bank Law, Sec. 108, subd. 5, in the following respects:

*Complaint*

- (a) interest charges are exacted on multiples of \$100.00 and not on amounts actually loaned;
- (b) interest charges are compounded, i.e., interest is charged on previously-imposed interest charges,
- (c) interest charges are computed on amounts greater than the "unpaid principal amount",
- (d) effective interest charges are in excess of the one percent per month maximum rate.

15. As a result of the foregoing, CITIBANK exacts interest charges in excess of that allowed by the laws of the State of New York, thereby violating 12 U.S.C. Sec. 85.

16. Because of this violation of Sec. 85 of the National Bank Act, the named plaintiff and the class members, pursuant to Sec. 86 of the Act, are entitled to:

- (a) receive twice the interest paid to CITIBANK; and
- (b) have all the interest they now owe deemed forfeited.

**COUNT II**

17. Repeats and reiterates each and every allegation set forth in paragraphs "1" through "15", inclusive, of this complaint, with the same force and effect as if more fully set forth at length herein.

18. The terms and conditions of the agreement between CITIBANK, the named plaintiff and the other class members provides that interest charges shall be computed "on the amount of credit in use" in each account.

19. In violation of these agreements, CITIBANK computes interest charges on amounts which include previously imposed interest charges, in addition to multiples of \$100.00, rather than the actual unpaid principal balance,

*Complaint*

and check maintenance charges and check service charges.

20. By reason of the foregoing, the named plaintiff and each of the class members have been damaged.

## COUNT III

21. Repeats and reiterates each and every allegation set forth in paragraphs "1" through "15", inclusive, of this complaint with the same force and effect as if more fully set forth at length herein.

22. Based on CITIBANK'S illegal computation of interest charges, it owes to plaintiff and each of the members of the class he represents, an amount equal to the illegal overcharges exacted from each of them, predicated upon money had and received.

## COUNT IV

23. Repeats and reiterates each and every allegation set forth in paragraphs "1" through "15", inclusive, of this complaint with the same force and effect as if more fully set forth at length herein.

24. Based on CITIBANK'S illegal computation of interest charges, it owes to plaintiff and each of the members of the class he represents, an amount equal to the illegal overcharges exacted from each of them, predicated on unjust enrichment of CITIBANK.

WHEREFORE, plaintiff demands judgment against defendant for himself and each member of the class, as follows:

## A. On Count I:

(i) Declaring that CITIBANK'S method of computing interest charges violates New York Banking Law Sec. 108, subd. 5 and the National Bank Act (12 U.S.C. Sec. 85).



*Complaint*

(ii) Declaring that all such interest charges now due, or to become due, be deemed forfeited, pursuant to 12 U.S.C. Sec. 86.

(iii) Requiring CITIBANK to pay to plaintiff and each class member an amount equal to twice the total interest charges paid by each of them, pursuant to 12 U.S.C. Sec. 86.

B. On Counts II, III and IV, that plaintiff and each of the class members recover of CITIBANK an amount equal to the excess interest charges paid by each of them, beyond contractual and statutory limits.

C. On all Counts:

(i) Enjoining CITIBANK from continuing to compute finance charges in the asserted illegal manner.

(ii) Adding appropriate interest to the amounts found to be due and owing from CITIBANK to plaintiff and each and every class member.

(iii) Awarding plaintiff the reasonable costs and expenses of this action, including counsel and accounting fees.

D. Granting such other and further relief as to the Court may seem just and proper.

s/ .....

SHELDON V. BURMAN

Attorney for Plaintiff  
Office and P.O. Address  
21 East 40th Street  
New York, New York 10016  
Tel. No. 685-7188

**Answer**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKJORDAN BROWN, and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 LFM

Defendant, by its attorneys, Shearman & Sterling, for its answer to the Complaint herein:

1. Denies each and every allegation contained in paragraph 1, (a) through (d) of the Complaint, except admits that the action is claimed by plaintiff to be based upon the statute and common law theories cited therein.

2. Denies each and every allegation contained in paragraph 2 of the Complaint, except admits that jurisdiction is claimed by plaintiff to be based upon the statutes cited therein.

3. Denies each and every allegation contained in paragraph 3 of the Complaint, except admits that First National City Bank ("Citibank") is a national banking association.

4. With respect to the allegations of paragraph 4 of the Complaint admits that Citibank is located in the State of New York and that venue is claimed by plaintiff to be based upon the statute cited therein.

*Answer*

5. Denies each and every allegation contained in paragraph 5, (a) through (g) of the Complaint, except admits that plaintiff purports to bring this action on behalf of persons who now have, or have had checking accounts with Citibank and who have also entered into Checking Plus Credit agreements with Citibank.

6. Denies each and every allegation contained in paragraph 6 of the Complaint, except admits that the named plaintiff has a checking account with Citibank and also entered into a Checking Plus Credit Agreement with Citibank.

7. Denies each and every allegation contained in paragraph 7 of the Complaint.

8. With respect to the allegations of paragraph 8 of the Complaint, admits that Citibank furnished plaintiff with monthly statements setting forth, among other things, the details of the previous month's loans, payments and interest charges.

9. Denies each and every allegation contained in paragraph 9 of the Complaint.

10. Denies each and every allegation contained in paragraph 10 of the Complaint, except admits that during the month ending September 25, 1972, plaintiff borrowed \$200.00 through his Checking Plus account.

11. With respect to the allegations of paragraph 11 of the Complaint, admits that the New York Banking Law, Section 108, subdivision 5 provides that interest may be charged and computed on loans and advances, and refers to said statute for the terms thereof.

12. With respect to the allegations of paragraph 12 of the Complaint, admits that the National Bank Act prohibits a National Bank from charging interest that exceeds certain rates, and refers to said statute for the terms thereof.

*Answer*

13. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 of the Complaint.

14. Denies each and every allegation contained in paragraph 14, (a) through (d) of the Complaint.

15. Denies each and every allegation contained in paragraph 15 of the Complaint.

16. Denies each and every allegation contained in paragraph 16 of the Complaint.

17. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

18. Denies each and every allegation contained in paragraph 18 of the Complaint.

19. Denies each and every allegation contained in paragraph 19 of the Complaint.

20. Denies each and every allegation contained in paragraph 20 of the Complaint.

21. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

22. Denies each and every allegation contained in paragraph 22 of the Complaint.

23. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

24. Denies each and every allegation contained in paragraph 24 of the Complaint.

FOR A FIRST DEFENSE, DEFENDANT ALLEGES:

25. The Complaint fails to state a claim against defendant upon which relief can be granted.



*Answer*

## FOR A SECOND DEFENSE, DEFENDANT ALLEGES:

26. 28 U.S.C. § 1355 does not extend federal jurisdiction to suits under 12 U.S.C. § 86 since such suits are not for the recovery or enforcement of a fine, penalty or forfeiture.

27. 28 U.S.C. § 1337 does not extend federal jurisdiction to suits under 12 U.S.C. § 86 since such suits do not relate to regulating commerce or protecting trade and commerce against restraints and monopolies.

28. This Court is without jurisdiction of the subject matter of this action.

## FOR A THIRD DEFENSE, DEFENDANT ALLEGES:

29. With full knowledge of the facts relating to the transactions set forth in the Complaint, plaintiff duly ratified and confirmed in all respects the charges by and payments to defendant with respect to plaintiff's Checking Plus account, and elected to consider the same proper and valid payments to defendant.

WHEREFORE, defendant First National City Bank demands judgment dismissing the Complaint, together with its costs and disbursements.

Dated: New York, New York  
November 13, 1972

SHEARMAN & STERLING

By JOHN E. HOFFMAN, JR.  
A Member of the Firm

Attorneys for Defendant  
First National City Bank  
53 Wall Street  
(212) 483-1000

**First Amended Answer**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN, and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 LFM

Defendant, by its attorneys, Shearman & Sterling, for its answer to the Complaint herein:

1. Denies each and every allegation contained in paragraph 1, (a) through (d) of the Complaint, except admits that the action is claimed by plaintiff to be based upon the statute and common law theories cited therein.

2. Denies each and every allegation contained in paragraph 2 of the Complaint, except admits that jurisdiction is claimed by plaintiff to be based upon the statutes cited therein.

3. Denies each and every allegation contained in paragraph 3 of the Complaint, except admits that First National City Bank ("Citibank") is a national banking association.

4. With respect to the allegations of paragraph 4 of the Complaint admits that Citibank is located in the State of New York and that venue is claimed by plaintiff to be based upon the statute cited therein.

5. Denies each and every allegation contained in paragraph 5, (a) through (g) of the Complaint, except admits

*First Amended Answer*

that plaintiff purports to bring this action on behalf of persons who now have, or have had checking accounts with Citibank and who have also entered into Checking Plus Credit agreements with Citibank.

6. Denies each and every allegation contained in paragraph 6 of the Complaint, except admits that the named plaintiff has a checking account with Citibank and also entered into a Checking Plus Credit Agreement with Citibank.

7. Denies each and every allegation contained in paragraph 7 of the Complaint.

8. With respect to the allegations of paragraph 8 of the Complaint, admits that Citibank furnished plaintiff with monthly statements setting forth, among other things, the details of the previous month's loans, payments and interest charges.

9. Denies each and every allegation contained in paragraph 9 of the Complaint.

10. Denies each and every allegation contained in paragraph 10 of the Complaint, except admits that during the month ending September 25, 1972, plaintiff borrowed \$200.00 through his Checking Plus account.

11. With respect to the allegations of paragraph 11 of the Complaint, admits that the New York Banking Law, Section 108, subdivision 5 provides that interest may be charged and computed on loans and advances, and refers to said statute for the terms thereof.

12. With respect to the allegations of paragraph 12 of the Complaint, admits that the National Bank Act prohibits a National Bank from charging interest that exceeds certain rates, and refers to said statute for the terms thereof.

*First Amended Answer*

13. Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraph 13 of the Complaint.

14. Denies each and every allegation contained in paragraph 14, (a) through (d) of the Complaint.

15. Denies each and every allegation contained in paragraph 15 of the Complaint.

16. Denies each and every allegation contained in paragraph 16 of the Complaint.

17. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

18. Denies each and every allegation contained in paragraph 18 of the Complaint.

19. Denies each and every allegation contained in paragraph 19 of the Complaint.

20. Denies each and every allegation contained in paragraph 20 of the Complaint.

21. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

22. Denies each and every allegation contained in paragraph 22 of the Complaint.

23. Repeats and realleges its answers to each and every allegation contained in paragraphs 1 through 15 of the Complaint, as if set forth at length herein.

24. Denies each and every allegation contained in paragraph 24 of the Complaint.



*First Amended Answer*

## FOR A FIRST DEFENSE, DEFENDANT ALLEGES:

25. The Complaint fails to state a claim against defendant upon which relief can be granted.

## FOR A SECOND DEFENSE, DEFENDANT ALLEGES:

26. 28 U.S.C. § 1355 does not extend federal jurisdiction to suits under 12 U.S.C. § 86 since such suits are not for the recovery or enforcement of a fine, penalty or forfeiture.

27. 28 U.S.C. § 1337 does not extend federal jurisdiction to suits under 12 U.S.C. § 86 since such suits do not relate to regulating commerce or protecting trade and commerce against restraints and monopolies.

28. This Court is without jurisdiction of the subject matter of this action.

## FOR A THIRD DEFENSE, DEFENDANT ALLEGES:

29. With full knowledge of the facts relating to the transactions set forth in the Complaint, plaintiff duly ratified and confirmed in all respects the charges by and payments to defendant with respect to plaintiff's Checking Plus account, and elected to consider the same proper and valid payments to defendant.

## FOR A FOURTH PARTIAL DEFENSE, DEFENDANT ALLEGES:

30. With respect to the First Cause of Action, to the extent that it purports to allege any claim accruing more than one year prior to the commencement of this action, it is barred by the statute of limitations.

## FOR A FIFTH PARTIAL DEFENSE, DEFENDANT ALLEGES:

31. With respect to the First Cause of Action, to the extent that it purports to allege any claim accruing more than two years prior to the commencement of this action, it is barred by the statute of limitations.

*First Amended Answer*

WHEREFORE, defendant First National City Bank demands judgment dismissing the Complaint, together with its costs and disbursements.

Dated: New York, New York  
November 28, 1972

SHEARMAN & STERLING

By JOHN E. HOFFMAN, JR.  
A Member of the Firm

Attorneys for Defendant  
First National City Bank  
53 Wall Street  
New York, New York 10005  
(212) 483-1000

**Notice of Motion**

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN, and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ 4516 LFM

TAKE NOTICE that upon the summons and complaint, the amended answer of defendant First National City Bank, the affidavit of John E. Muller, Assistant Vice-President of First National City Bank, dated December 12, 1972, and the exhibits annexed thereto, the affidavit of Albert A. Cardone, member of the firm of Haskins & Sells, Certified Public Accountants, dated December 15, 1972, and the exhibits annexed thereto, and upon all the prior proceedings had herein, the undersigned will move before this Court at Room 501 of the United States Courthouse, Foley Square, New York, New York, on the 29th day of December, 1972, at 2:15 P.M. or as soon thereafter as counsel can be heard, for an order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment dismissing the complaint herein with prejudice as to defendant upon the ground that there is no genuine issue as

*Notice of Motion*

to any material fact and that defendant is entitled to judgment as a matter of law with costs and disbursements.

Dated: New York, New York  
December 15, 1972

SHEARMAN & STERLING

By JOHN E. HOFFMAN, JR.  
A Member of the Firm

Attorneys for Defendant  
First National City Bank  
53 Wall Street  
New York, New York 10005

To:

Sheldon V. Burman  
Attorney for Plaintiff  
21 East 40th Street  
New York, New York 10016



**Statement Pursuant to General Rule 9(g)****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

[Same Title]

Pursuant to Rule 9(g) of the General Rules of this Court, defendant First National City Bank submits the following statement of material facts as to which the moving party contends there is no issue to be tried:

1. Plaintiff Jordan Brown and defendant First National CityBank ("Citibank") entered into a Checking Plus Credit Agreement (the "Agreement") in July, 1972. At the same time, plaintiff also opened a special checking account with Citibank.

2. Pursuant to the terms of the Agreement, plaintiff was entitled, *inter alia*, to draw checks against his special checking account in excess of the credit balance thereof; such overdrafts resulting in debits to plaintiff's Checking Plus Account and credits to plaintiff's special checking account, both debits and credits being in the multiple of \$100.00 appropriate to cover plaintiff's overdrafts.

3. Plaintiff drew five (5) loans from defendant, all in the appropriate multiple of \$100.00 pursuant to the Agreement, in the total amount of \$900.00.

4. Interest charged by defendant on plaintiff's Checking Plus Account loans was computed, pursuant to the terms of the Agreement, by multiplying the average of daily principal balances times the daily rate of .03333% and then multiplying the result by the number of days in the billing cycle.

5. The interest charged by defendant on plaintiff's Checking Plus Account loans was computed only on amounts actually loaned to plaintiff by defendant.

*Statement Pursuant to General Rule 9(g)*

6. The interest charged by defendant on plaintiff's Checking Plus Account loans was not "compounded," i.e., interest was not computed on previously imposed interest charges.

7. The interest charged by defendant on plaintiff's Checking Plus Account loans was not computed on amounts greater than the unpaid principal, i.e., interest was not computed on check service charges or check maintenance charges.

8. The computation of defendant's interest charges to plaintiff is accurate and in accordance with the terms and conditions of the Agreement between plaintiff and defendant.

Dated: New York, New York  
December 12, 1972

SHEARMAN & STERLING

By JOHN E. HOFFMAN, JR.  
A Member of the Firm

Attorneys for Defendant  
First National City Bank  
53 Wall Street  
New York, New York 10005

**Affidavit in Support of Motion for Summary Judgment****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK }  
COUNTY OF NEW YORK }

JOHN E. MULLER, being duly sworn, says:

1. I am an Assistant Vice-President of defendant, First National City Bank ("Citibank") and am assigned to the Personal Finance Department which has responsibility for the administration of all "Checking Plus" accounts, which are the subject matter of the complaint in this action.

2. This Affidavit is respectfully submitted in support of a motion, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, for an Order granting summary judgment to defendant.

3. I am thoroughly familiar with the facts and circumstances relating to the Checking Plus account and special checking account currently maintained at Citibank by plaintiff.

4. Plaintiff applied for a special checking account at Citibank on June 30, 1972. Plaintiff also applied for a Checking Plus account at Citibank on the same date. In connection with said application, plaintiff accepted the terms and conditions of the Checking Plus Credit Agreement (the "Agreement"), a copy of which is annexed hereto as Exhibit A. Plaintiff's application for a Checking Plus account was approved by Citibank on July 7, 1972 and thereafter plaintiff was entitled to draw down loans from Citibank, subject to the terms and conditions of the Agreement, in either of the following ways:

*Affidavit in Support of Motion for Summary Judgment*

"(1) the Bank shall automatically debit the [Checking Plus] Account and make a corresponding credit to the above-numbered [special] checking account in multiples of \$100 or the unused portion of said Maximum Credit if less than \$100 any time the amount of checks drawn against, or other charges to, said [special] checking account are in excess of the credit balance thereof;

(2) upon receipt by the Bank of an acceptable written authorization from the Applicant, the [Checking Plus] Account will be debited in the amount authorized and a corresponding credit will be made to the above-numbered [special] checking account." (Exhibit A).

5. In connection with defendant's loans to plaintiff under the terms and conditions of the Agreement previously described, I have reviewed plaintiff's Checking Plus and special checking account statements for the months of July, August, September, October 1972, copies of which are annexed hereto as Exhibits B and C, respectively. On each and every loan by defendant to plaintiff, the loan was drawn by plaintiff under the first alternative provision of the Agreement, i.e., plaintiff overdrew his special checking account on five (5) separate occasions in such a manner as to cause defendant to extend five (5) separate loans to plaintiff. The statements referred to are summarized as follows:

a.) *July* (closing date of Checking Plus statement—July 25, 1972).

There were no loans drawn by plaintiff and extended by defendant during this period and consequently no interest charges of any kind were imposed by defendant or paid by plaintiff.

b.) *August* (closing date of Checking Plus Statement—August 25, 1972).



*Affidavit in Support of Motion for Summary Judgment*

There were four loans drawn by plaintiff during this period, each of which was automatically generated by plaintiff's drawing upon his special checking account in amounts in excess of the credit balance thereof. Such overdrafts in plaintiff's special checking account caused defendant to debit plaintiff's Checking Plus account and credit his special checking account, both debits and credits being in multiples of \$100.00. For example, plaintiff drew a check on his special checking account in the amount of \$150.00 on August 1, 1972. This caused plaintiff's special checking account to be overdrawn in the amount of \$150.60. In response and pursuant to the terms of the Agreement on August 3, 1972, Citibank made a loan of \$200.00 to plaintiff, thus covering the overdraft, by debiting plaintiff's Checking Plus account in the amount of \$200.00 and crediting his special checking account in the same amount. As a result of this loan, plaintiff's special checking account had a credit balance of \$49.40 on August 3, 1972 (i.e.,  $\$200.00 - \$150.60 = \$49.40$ ). Each of the three successive overdrafts in plaintiff's special checking account during the August billing cycle similarly gave rise to a loan to plaintiff by Citibank through the debiting of plaintiff's Checking Plus account and the crediting of plaintiff's special checking account in the multiple of \$100.00 appropriate to cover plaintiff's respective overdrafts.

Interest in the amount of \$3.89 was charged by defendant on plaintiff's Checking Plus account for the August billing cycle. The interest was computed on the average of daily principal balances (\$376.50); this amount is determined by adding together the respective principal balances outstanding in the account each day during the billing cycle (calculated daily by de-

*Affidavit in Support of Motion for Summary Judgment*

biting the account with the amount of each new loan when made and crediting the account with the amount of each payment applied to reduce principal when received) and dividing the sum of such daily principal balances by the number of days in the billing cycle (the "average of daily principal balances"). The average of daily principal balances was multiplied by the daily periodic rate of .03333% then the result was multiplied by the number of days in the billing cycle (July 26 through August 25 = 31 days). Thus  $\$376.50 \times .03333\% \times 31 \text{ days} = \$3.89$ . Thus interest was calculated on the average of daily principal balances which reflected loans actually made to plaintiff's Checking Plus account and credited to plaintiff's special checking account during this billing cycle.

(c.) *September* (closing date of Checking Plus Statement—September 25, 1972). There was one loan drawn by plaintiff and extended by defendant as well as one payment made by plaintiff to defendant during this billing cycle. Plaintiff drew two checks on his special checking account on September 8, 1972 which resulted in an overdraft of \$128.57 in the account.

In response and pursuant to the terms of the agreement on September 11, 1972, Citibank made a loan of \$200.00 to plaintiff, thus covering plaintiff's overdraft, by debiting plaintiff's Checking Plus account in the amount of \$200.00 and crediting his special checking account in the same amount. As a result of this loan, plaintiff's special checking account had a credit balance of \$71.43 on September 11, 1972 (i.e.,  $\$200.00 - \$128.57 = \$71.43$ ).

Interest in the amount of \$10.07 was charged by defendant on plaintiff's Checking Plus account for the September billing cycle.

*Affidavit in Support of Motion for Summary Judgment*

The interest was computed by multiplying the average of daily principal balances (\$974.64) by the daily periodic rate of .03333% and then multiplying the result by 31 (August 26 through September 25 = 31 days). Thus  $\$974.64 \times .03333\% \times 31 \text{ days} = \$10.07$ . In arriving at the average of daily principal balances, plaintiff's payment of \$41.39 on September 8, 1972 was applied first to interest incurred in the previous billing cycle (\$3.89) and then to principal (\$37.50). The unpaid principal as of August 25, 1972 (\$900.00) was thus reduced to \$862.50 on September 8th. When plaintiff borrowed \$200.00 on September 11, 1972, the unpaid principal became \$1,062.50. The interest charged for this billing cycle (\$10.07) was computed on the basis of the average of the daily principal balances only and was not in any way computed on the basis of the prior billing cycle's interest charge of \$3.89.

d.) *October* (closing date of Checking Plus Statement—October 25, 1972).

There were no loans drawn by plaintiff during this billing period. There were, however, three payments made by plaintiff in the total amount of \$204.35. Of this amount, \$10.07 was applied to the interest charge incurred by plaintiff during the previous billing cycle, and the remaining \$194.28 was applied to plaintiff's outstanding principal balance of \$1,062.50, thus finally reducing it to \$868.22 ( $\$1,062.50 - \$194.28 = \$868.22$ ).

Interest in the amount of \$9.65 was charged by defendant on plaintiff's Checking Plus account for this period. The interest was computed by multiplying the average of daily principal balances (\$965.09) by the daily periodic rate of .03333% and then multiplying the result by the number of days in the billing cycle (Sep-



*Affidavit in Support of Motion for Summary Judgment*

tember 26 through October 25 = 30 days). Thus  $\$965.09 \times .03333\% \times 30 \text{ days} = \$9.65$ .

6. Interest on plaintiff's Checking Plus loans during the August, September and October billing cycles was calculated and charged by defendant on the basis of plaintiff's average daily principal balances. Such principal balances represented money actually loaned to plaintiff by defendant in accordance with the Agreement. Interest was never calculated and charged by defendant on money not actually loaned to plaintiff, nor was interest ever calculated and charged on accrued interest, check maintenance charges or check service charges.

7. I have read the complaint in this action, and with particular reference to paragraph 14(a), (b) and (c) of the complaint state as a fact that:

- a.) interest was charged to plaintiff only on amounts actually loaned;
- b.) interest charges were not "compounded"—they were not charged on previously imposed interest charges; and
- c.) interest charges were not computed on amounts greater than the unpaid principal.

With respect to the allegations of paragraph 14(d) of the complaint, I am advised by Citibank's attorneys that neither the Agreement nor the statute governing maximum rates of interest, referred to in paragraph 14 of the complaint, prescribes "one percent per month" as the "maximum rate" applicable to loans under the Agreement.

8. In connection with this action, I have supplied Albert A. Cardone, a member of Haskins & Sells, Certified Public Accountants, with copies of plaintiff's Checking Plus and



*Affidavit in Support of Motion for Summary Judgment*

special checking account statements for July, August, September and October and the Checking Plus Agreement entered into by plaintiff and defendant. I have asked Mr. Cardone to review plaintiff's statements and the Agreement and to certify the accuracy of Citibank's computations therein based on said Agreement.

.....  
John E. Muller

Sworn to before me this  
12th day of December, 1972.

.....  
Notary Public

GILBERT H. BLEICH  
Notary Public, State of New York  
No. 24-0318850 Qualified in Kings Co.  
Certificate Filed in New York County  
Commission Expires March 30, 1973

MAXIMUM CREDIT  
\$1200.00

MONTHLY REPAYMENT  
SCHEDULE

☐ 12 ☒ 24 ☐ 36

CREDIT APPROVAL	COMMENTS
SIGNATURE(S)  <i>ck</i>	<i>1200 Hing</i>
PRINT NAME(S) AND TITLE(S)  <b>FRANCH APPROVAL</b>	<b>M. CHAN</b> <b>000730</b>

[*Exhibit A*]

APP. NO. CP  
23-411  
8544 6983 JUL 7'72  
ACCOUNT NO. CP

PRC 635 8-71 CHECKING PLUS CREDIT AGREEMENT Checking Account No. \_\_\_\_\_ Account No. CP. \_\_\_\_\_

Relative to the Checking Plus Application submitted herewith (hereinafter called the "Application"), and to induce FIRST NATIONAL CITY BANK (hereinafter called the "Bank"), in reliance thereon, to make available to the Applicant (the "Applicant" being the person(s) signing the Application), a Checking Plus Account (hereinafter called the "Account"), under which the Bank will make one or more loans to the Applicant, the unpaid principal balance of which shall not exceed the "Maximum Credit" specified by the Bank in writing to the Applicant, the Applicant agrees to the provisions set forth herein. Loans hereunder shall be made in either of the following ways: (1) the Bank shall automatically debit the Account and make a corresponding credit to the above-numbered checking account in multiples of \$100 or the unused portion of said Maximum Credit if less than \$100 any time the amount of checks drawn against, or other charges to, said checking account are in excess of the credit balance thereof; (2) upon receipt by the Bank of an acceptable written authorization from the Applicant, the Account will be debited in the amount authorized and a corresponding credit will be made to the above-numbered checking account. Any checks or other charges presented against said checking account in excess of said checking account balance, or any written authorizations as aforesaid, shall be treated by the Bank as a request for loans under the terms hereof. Such loans shall be deemed to have been made at the time of presentation of such checks or other charges or, in the case of written authorizations, at the time of receipt of such authorizations.

THE APPLICANT HEREBY PROMISES TO PAY THE BANK AT THE ADDRESS SHOWN ON THE BELOW-MENTIONED CHECKING PLUS STATEMENT, MONTHLY ON OR BEFORE THE PAYMENT DATE SPECIFIED IN SAID STATEMENT: (i) AN INSTALLMENT EQUAL TO \_\_\_\_\_ OF THE UNPAID PRINCIPAL BALANCE IN THE ACCOUNT AS OF THE DATE THE MOST RECENT LOAN IS DEBITED TO THE ACCOUNT, SUBJECT TO A MINIMUM INSTALLMENT OF \$10 OR THE UNPAID PRINCIPAL BALANCE, WHICHEVER IS LESS, UNTIL PAYMENT IN FULL OF THE PRINCIPAL BALANCE OR UNTIL ADDITIONAL LOANS ARE MADE AND ARE DEBITED TO THE ACCOUNT, BUT THE AMOUNT OF ANY INSTALLMENT DUE AND PAYABLE SHALL NOT BE AFFECTED BY ANY NEW LOANS DEBITED TO THE ACCOUNT AFTER THE RELEVANT STATEMENT CLOSING DATE (SPECIFIED IN THE MONTHLY CHECKING PLUS STATEMENT); (ii) A FINANCE CHARGE (INTEREST) COMPUTED BY APPLYING A DAILY PERIODIC RATE OF .0333% (THE "DAILY PERIODIC RATE") (RESULTING IN A CORRESPONDING ANNUAL PERCENTAGE RATE OF 12.17%) TO THE AVERAGE OF DAILY PRINCIPAL BALANCES (AS HEREINAFTER DEFINED) MULTIPLIED BY THE NUMBER OF DAYS INCLUDED IN THE PERIOD COVERED BY THE CHECKING PLUS STATEMENT (THE "BILLING CYCLE"); (iii) IN THE EVENT OF DEFAULT, IN ADDITION TO THE ACCRUED FINANCE CHARGES, A FINE ("LATE CHARGE") IN AN AMOUNT NOT TO EXCEED 4¢ PER \$1 OF PRINCIPAL OF ANY INSTALLMENT WHICH HAS BECOME DUE AND REMAINED UNPAID FOR A PERIOD IN EXCESS OF 10 DAYS, BUT NO SUCH LATE CHARGE SHALL EXCEED \$5 AND THE AGGREGATE OF ALL SUCH LATE CHARGES COLLECTED IN ANY CALENDAR YEAR SHALL NOT EXCEED \$15; IT BEING UNDERSTOOD THAT EACH AMOUNT PAID BY THE APPLICANT TO THE BANK HEREUNDER MAY BE APPLIED TO FINANCE CHARGES IMPOSED ON THE ACCOUNT, LATE CHARGES AND PRINCIPAL, IN THE ORDER NAMED. A FINANCE CHARGE IS IMPOSED ON THE ACCOUNT WHENEVER AND SO LONG AS ANY UNPAID PRINCIPAL BALANCE EXISTS IN THE ACCOUNT. THE BALANCE UPON WHICH THE FINANCE CHARGE IS IMPOSED IS DETERMINED BY ADDING TOGETHER THE RESPECTIVE PRINCIPAL BALANCES OUTSTANDING IN THE ACCOUNT EACH DAY DURING THE BILLING CYCLE (CALCULATED DAILY BY DEBITING THE ACCOUNT WITH THE AMOUNT OF EACH NEW LOAN WHEN MADE AND CREDITING THE ACCOUNT WITH THE AMOUNT OF EACH PAYMENT APPLIED TO REDUCE PRINCIPAL WHEN RECEIVED) AND DIVIDING THE SUM OF SUCH DAILY PRINCIPAL BALANCES BY THE NUMBER OF DAYS IN THE BILLING CYCLE (THE "AVERAGE OF DAILY PRINCIPAL BALANCES").

It is agreed that: (a) the Bank, at its option, may honor one or more checks drawn against, or other charges to, the above-numbered checking account or written authorizations, although to do so may cause the unpaid principal balance of the Account to exceed the Maximum Credit relative to the Account; (b) the Bank will, each month in which a debit balance exists in the Account or during which a FINANCE CHARGE has been imposed, prepare and mail to the Applicant promptly following the Statement Closing Date specified therein a "Checking Plus Statement" setting forth, among other things, the outstanding balance hereunder (principal, accrued FINANCE CHARGES and Late Charges) as of the beginning of the Billing Cycle covered by the Statement, the FINANCE CHARGE(S) and Late Charge(s), if any, imposed during the Billing Cycle, the amounts credited during the Billing Cycle on account of payments and other credits, the amounts debited to the Account for loans made during the Billing Cycle and the outstanding balance hereunder (principal, accrued FINANCE CHARGES and Late Charges) as of the last day of the Billing Cycle, as well as the minimum payment required for the month; (c) each such Checking Plus Statement will be considered correct unless the Applicant notifies the Bank in writing to the contrary within 10 days after the Bank has mailed, or otherwise made available, such Statement to the Applicant; (d) the Bank is authorized to complete any blank spaces in this Agreement according to the terms upon which credit is extended; (e) the Applicant shall furnish the Bank with financial statements promptly upon request from time to time in such detail as may be required; and (f) the Applicant may at any time prepay the unpaid principal balance of the Account, in whole or in part, with accrued FINANCE CHARGES to the date of prepayment and all Late Charges, provided that such prepayment is accompanied by a properly completed payment ticket (enclosed with the monthly Checking Plus Statement) or by any other properly completed form of notice of prepayment authorized by the Bank, it being understood by Applicant that payments and prepayments on the Account may be made only by the foregoing means and that deposits to the above-mentioned checking account will not be applied to pay or prepay any charges hereunder for loans, FINANCE CHARGES or Late Charges.

AS COLLATERAL SECURITY FOR THE PAYMENT OF THE INDEBTEDNESS OF THE APPLICANT HEREUNDER AND ALL OTHER INDEBTEDNESS OR LIABILITIES OF THE APPLICANT TO THE BANK (ALL SUCH INDEBTEDNESS AND LIABILITIES BEING HEREINAFTER CALLED THE "OBLIGATIONS"), THE BANK SHALL HAVE, AND IS HEREBY GRANTED, A SECURITY INTEREST AND/OR RIGHT OF SET-OFF IN AND TO ALL MONIES, SECURITIES AND OTHER PROPERTY OF THE APPLICANT NOW OR HEREAFTER ON DEPOSIT WITH OR OTHERWISE HELD BY OR COMING INTO THE POSSESSION OR UNDER THE CONTROL OF THE BANK AND, THE BANK MAY, AT ITS OPTION AT ANY TIME(S) AND WITH OR WITHOUT NOTICE TO THE APPLICANT, APPROPRIATE AND APPLY TO THE PAYMENT OR REDUCTION, EITHER IN WHOLE OR IN PART, OF THE AMOUNT OWING ON ALL OR ANY SUCH OBLIGATIONS (WHETHER OR NOT THEN DUE), ANY OR ALL OF SUCH MONIES, SECURITIES OR OTHER PROPERTY.

In event of the failure of the Applicant to pay any amount payable hereunder when due or to perform or observe any agreement contained herein on Applicant's part to be performed or observed, or should any financial statement furnished to the Bank by the Applicant be false or misleading in any material respect, or in event the Applicant shall have failed to inform the Bank of any material changes in the financial condition of the Applicant, or in the event of the insolvency, bankruptcy or death of the Applicant, or should the affairs of the Applicant, in the opinion of the Bank, so change as to impair the Bank's security or increase its credit risk, or should the Bank, in good faith, at any time deem itself insecure - then, and in any such event, all or any part of the Obligations shall, at the option of the Bank, become immediately due and payable without demand or notice and the Bank's agreement to extend credit to the Applicant hereunder shall immediately terminate, irrespective of whether any checks or other charges relating to the above-numbered checking account shall then be outstanding or any written authorization is then being processed. IF UPON THE HAPPENING OF ANY SUCH EVENT, THIS AGREEMENT IS REFERRED TO AN ATTORNEY FOR COLLECTION, THE APPLICANT AGREES TO PAY A SUM EQUAL TO ALL COSTS AND EXPENSES THEREOF, INCLUDING AN ATTORNEY'S FEE FOR NECESSARY COURT PROCESS, NOT TO EXCEED 15% OF THE AMOUNT DUE AND OWING HEREUNDER AT THE TIME OF SUCH REFERENCE. The Applicant and the Bank hereby waive their respective rights to demand trial by jury in any litigation (whether or not arising out of or relating to matters connected with this Agreement) in which the Applicant and the Bank may be adverse parties, and additionally, the Applicant waives the right to interpose in any such litigation any counterclaim of any nature or description which the Applicant may have against the Bank.

This Agreement may be terminated at the time the person named as "Borrower" on the Application becomes 70 years of age, or at any other time upon written notice by the Bank or the Applicant to the other, but no such termination shall affect any checks or other charges relating to the above-numbered checking account then outstanding or the obligations of the Applicant hereunder.

The Bank, at its option, whether requested by the Applicant or not, may change the Applicant's regular Statement Closing Date or the identifying Account and/or checking account number referred to above, from time to time, and may be required by changes in branch of domicile of the checking account, changes in type of checking account or changes in operating procedures or otherwise, and upon any such change the Agreement shall then be applicable to the Account and/or such checking account as renumbered.

If the Application is signed by two persons, each person authorizes the other to incur indebtedness hereunder, and such persons shall be jointly and severally liable therefor.

This Agreement and the rights granted to the Applicant hereunder are in addition to other agreements governing the above-numbered Account or checking account; however, in event any term or provision hereof conflicts with any term or provision of any other agreement relative to the above-numbered Account or checking account, the terms hereof shall be deemed controlling.

[Exhibit A]



☐ READY-CREDIT ☒ CHECKING PLUS STATEMENT

8/25/72

FIRST NATIONAL CITY BANK

BOX 300, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

THE STATUS OF YOUR ACCOUNT IS INDICATED BELOW:

TOTAL PAYMENT(S) WERE APPLIED AS FOLLOWS:

UNPAID PRINCIPAL	CREDIT AVAILABLE	MAXIMUM CREDIT
900.00	300.00	1200.00

TOTAL PAYMENT(S)	FINANCE CHARGE INTEREST	LATE CHARGE	PRINCIPAL PAYMENT(S)

YOUR MINIMUM PAYMENT DUE IS COMPRISED OF:

SUMMARY OF ACTIVITY THIS PERIOD:

PREVIOUSLY BILLED AND UNPAID	MONTHLY PRINCIPAL PAYMENT	FINANCE CHARGE	MINIMUM PAYMENT DUE
0.00	37.50	3.89	41.39

PREVIOUS BALANCE	FINANCE CHARGE INTEREST	LATE CHARGE	TOTAL PAYMENT(S) AND OTHER CREDITS	CHECKS AND OTHER DEBITS	NEW BALANCE
	3.89	.00		900.00	903.89

FINANCE CHARGE is computed by multiplying the AVERAGE OF DAILY PRINCIPAL BALANCES (shown at right) outstanding during the billing cycle, which represents the average of the principal balances outstanding in the account during the billing cycle on a daily basis and is determined by debiting charges for loans when made and applying credits as received (to the extent applied to principal) during the monthly billing cycle, by the DAILY PERIODIC RATE (shown at right) and multiplying the result by the number of days in the billing cycle, plus a check service charge of .004 a check on Ready-Credit accounts.

AVERAGE OF DAILY PRINCIPAL BALANCES	DAILY PERIODIC RATE	ANNUAL PERCENTAGE RATE
375.50	.03333 %	12.17 %

VACCT NO 85446983 24 6323545600A\*

MR JORDAN BROWN  
303 E 71 ST  
N Y N Y  
10021

NOTICE: SEE REVERSE FOR IMPORTANT  
INFORMATION INCLUDING CODE

MONTH'S TRANSACTIONS IN BILLING CYCLE					
CODE	DATE	AMOUNT	CODE	DATE	AMOUNT
	MO DAY			MO DAY	
6	8 03	200 00	6	8 15	200 00
6	8 16	100 00			

TOTAL  
PAYMENT MADE  
\$

☐ READY-CREDIT ☒ CHECKING PLUS STATEMENT

7/25/72

FIRST NATIONAL CITY BANK

BOX 300, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

THE STATUS OF YOUR ACCOUNT IS INDICATED BELOW:

TOTAL PAYMENT(S) WERE APPLIED AS FOLLOWS:

UNPAID PRINCIPAL	CREDIT AVAILABLE	MAXIMUM CREDIT
0.00	1200.00	1200.00

TOTAL PAYMENT(S)	FINANCE CHARGE INTEREST	LATE CHARGE	PRINCIPAL PAYMENT(S)

YOUR MINIMUM PAYMENT DUE IS COMPRISED OF:

SUMMARY OF ACTIVITY THIS PERIOD:

PREVIOUSLY BILLED AND UNPAID	MONTHLY PRINCIPAL PAYMENT	FINANCE CHARGE	MINIMUM PAYMENT DUE
0.00	0.00	0.00	0.00

PREVIOUS BALANCE	FINANCE CHARGE INTEREST	LATE CHARGE	TOTAL PAYMENT(S) AND OTHER CREDITS	CHECKS AND OTHER DEBITS	NEW BALANCE
0.00	0.00	0.00			

FINANCE CHARGE is computed by multiplying the AVERAGE OF DAILY PRINCIPAL BALANCES (shown at right) outstanding during the billing cycle, which represents the average of the principal balances outstanding in the account during the billing cycle on a daily basis and is determined by debiting charges for loans when made and applying credits as received (to the extent applied to principal) during the monthly billing cycle, by the DAILY PERIODIC RATE (shown at right) and multiplying the result by the number of days in the billing cycle, plus a check service charge of .004 a check on Ready-Credit accounts.

AVERAGE OF DAILY PRINCIPAL BALANCES	DAILY PERIODIC RATE	ANNUAL PERCENTAGE RATE
0.00	.03333 %	12.17 %

VACCT NO 85446983 24 6323544000A\*

MR JORDAN BROWN  
303 E 71 ST  
N Y N Y  
10021

NOTICE: SEE REVERSE FOR IMPORTANT  
INFORMATION INCLUDING CODE

MONTH'S TRANSACTIONS IN BILLING CYCLE					
CODE	DATE	AMOUNT	CODE	DATE	AMOUNT
	MO DAY			MO DAY	

TOTAL  
PAYMENT MADE  
\$

[Exhibit B]



☐ READY-CREDIT ☒ CHECKING PLUS STATEMENT

10/25/72

**FIRST NATIONAL CITY BANK**  
BOX 380, GRAND CENTRAL STATION, NEW YORK, N. Y. 10017

THE STATUS OF YOUR ACCOUNT IS INDICATED BELOW:

UNPAID PRINCIPAL	CREDIT AVAILABLE	MAXIMUM CREDIT
868.22	1131.78	2000.00

TOTAL PAYMENT(S)	FINANCE CHARGE	LATE CHARGE	PRINCIPAL PAYMENT(S)
204.35	10.07		194.28

YOUR MINIMUM PAYMENT DUE IS COMPRISED OF:

PREVIOUSLY BILLED AND UNPAID	MONTHLY PRINCIPAL PAYMENT	FINANCE CHARGE	MINIMUM PAYMENT DUE
.00	44.28	9.65	53.93

PREVIOUS BALANCE	FINANCE CHARGE	LATE CHARGE	TOTAL PAYMENT(S) AND OTHER CREDITS	CHECKS AND OTHER DEBITS	NEW BALANCE
1072.57	9.65	.00	204.35		677.67
AVERAGE OF DAILY PRINCIPAL BALANCES		DAILY PERIODIC RATE	ANNUAL PERCENTAGE RATE		
565.09		.03333%	12.17%		

FINANCE CHARGE is computed by multiplying the AVERAGE OF DAILY PRINCIPAL BALANCES (shown at right) outstanding during the billing cycle, which represents the average of the principal balances outstanding in the account during the billing cycle on a daily basis and is determined by debiting charges for loans when made and applying credits as received (to the extent applied to principal) during the monthly billing cycle by the DAILY PERIODIC RATE (shown at right) and multiplying the result by the number of days in the billing cycle plus a check service charge of 20¢ a check on Ready Credit accounts.

▽ ACCT NO 85446983 24 63235456DDA\*

MR JORDAN BROWN  
303 E 71 ST  
N Y N Y  
10021

NOTICE: SEE REVERSE FOR IMPORTANT INFORMATION INCLUDING CODE

MONTH'S TRANSACTIONS IN BILLING CYCLE					
CODE	DATE	AMOUNT	CODE	DATE	AMOUNT
1	10 04	54 35	1	10 11	100 00
1	10 17	50 00			

TOTAL PAYMENT MADE  
\$

☐ READY-CREDIT ☒ CHECKING PLUS STATEMENT

9/25/72

**FIRST NATIONAL CITY BANK**  
BOX 380, GRAND CENTRAL STATION, NEW YORK, N.Y. 10017

THE STATUS OF YOUR ACCOUNT IS INDICATED BELOW:

UNPAID PRINCIPAL	CREDIT AVAILABLE	MAXIMUM CREDIT
1062.50	137.50	1200.00

TOTAL PAYMENT(S)	FINANCE CHARGE	LATE CHARGE	PRINCIPAL PAYMENT(S)
41.39	3.89		37.50

YOUR MINIMUM PAYMENT DUE IS COMPRISED OF:

PREVIOUSLY BILLED AND UNPAID	MONTHLY PRINCIPAL PAYMENT	FINANCE CHARGE	MINIMUM PAYMENT DUE
.00	44.28	10.07	54.35

PREVIOUS BALANCE	FINANCE CHARGE	LATE CHARGE	TOTAL PAYMENT(S) AND OTHER CREDITS	CHECKS AND OTHER DEBITS	NEW BALANCE
903.69	10.07	.00	41.39		1072.57
AVERAGE OF DAILY PRINCIPAL BALANCES		DAILY PERIODIC RATE	ANNUAL PERCENTAGE RATE		
974.64		.03333%	12.17%		

FINANCE CHARGE is computed by multiplying the AVERAGE OF DAILY PRINCIPAL BALANCES (shown at right) outstanding during the billing cycle, which represents the average of the principal balances outstanding in the account during the billing cycle on a daily basis and is determined by debiting charges for loans when made and applying credits as received (to the extent applied to principal) during the monthly billing cycle by the DAILY PERIODIC RATE (shown at right) and multiplying the result by the number of days in the billing cycle plus a check service charge of 20¢ a check on Ready Credit accounts.

▽ ACCT NO 85446983 24 63235456DDA\*

MR JORDAN BROWN  
303 E 71 ST  
N Y N Y  
10021

NOTICE: SEE REVERSE FOR IMPORTANT INFORMATION INCLUDING CODE

MONTH'S TRANSACTIONS IN BILLING CYCLE					
CODE	DATE	AMOUNT	CODE	DATE	AMOUNT
1	9 08	41 39	6	9 11	200 00

TOTAL PAYMENT MADE  
\$

## FIRST NATIONAL CITY BANK

ACCOUNT OF

NEW YORK

ACCOUNT NUMBER

JORDAN BROWN  
303 E 71 ST  
NEW YORK NY 1002

63235456

23



PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS (SEE REVERSE SIDE)

DEBITS (CHECKS)		CREDITS (DEPOSITS)		DATE	BALANCE
BALANCE BROUGHT FORWARD		7 03 72			.00
200.00	.15	800.00		7 03	800.00
100.00	.15			7 05	209.70
50.00	.15			7 06	199.55
35.00	.15			7 10	140.40
50.00	.15			7 11	28.95
25.00	.15			7 19	3.80
125.00	.15			7 20	121.3500
		125.00R .15		7 21	3.80
4.00A				7 26	.2000
.25S				7 27	.4500

9	NO. OF CREDITS	2	DATE RENDERED	7 27 72	1
LAST AMOUNT ABOVE IS YOUR FINAL BALANCE ON DATE RENDERED					
PLEASE INFORM US IMMEDIATELY OF ANY EXCEPTION(S) TAKEN BY YOU, GIVING FULL DETAILS AND YOUR ACCOUNT NUMBER					
A CHARGE MEMO	D AUTHORIZED DEBIT	M CREDIT MEMO	R RETURNED ITEM		
K CREDIT MEMO (REFER TO ADVICES)	E AUTHORIZED CREDIT	(REFER TO ADVICES)	S SERVICE CHARGE		
L CERTIFIED CHECK (ENCLOSED OR OUTSTANDING)	L LIST	N INDIRECT DRAWING	E O.M. BAL. END		

[Exhibit C]

## FIRST NATIONAL CITY BANK

ACCOUNT OF

NEW YORK

ACCOUNT NUMBER

JORDAN BROWN  
303 E 71 ST  
NEW YORK NY 1002

63235456

23



PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS (SEE REVERSE SIDE)

DEBITS (CHECKS)		CREDITS (DEPOSITS)		DATE	BALANCE
BALANCE BROUGHT FORWARD				7 28 72	150.00
150.00	.15	200.00B		8 01	150.00
55.87	.15			8 03	49.40
450.00	.15	200.00B		8 14	141.77
25.00	.15	400.00B		8 15	391.92
		100.00B		8 16	17.07
15.26	.15			8 17	82.93
.255				8 22	63.52
				8 28	63.27

O OF DEBITS	6	NO OF CREDITS	4	DATE RENDERED	8 28 72	19
-------------	---	---------------	---	---------------	---------	----

LAST AMOUNT ABOVE IS YOUR FINAL BALANCE ON DATE RENDERED

PLEASE INFORM US IMMEDIATELY OF ANY EXCEPTION(S) TAKEN BY YOU, GIVING FULL DETAILS AND YOUR ACCOUNT NUMBER

KEY TO	A - CHARGE MEMO	D - AUTHORIZED DEBIT	M - CREDIT MEMO	R - RETURNED ITEM
SYMBOLS	B - CREDIT MEMO (REFER TO ADVICES)	E - AUTHORIZED CREDIT	(REFER TO ADVICES)	S - SERVICE CHARGE
	C - CERTIFIED CHECK (ENCLOSED OR OUTSTANDING)	L - LIST	N - INDIRECT DRAWING	E O M BAL. END
			OD - OVERDRAFT	OF MONTH BALANCE

[Exhibit C]

# FIRST NATIONAL CITY BANK NEW YORK

ACCOUNT OF

ACCOUNT NUMBER

JORDAN BROWN  
303 E 73 ST  
NEW YORK NY 1002

632 35450

23



PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS (SEE REVERSE SIDE)

DEBITS (CHECKS)	BALANCE BROUGHT FORWARD	CREDITS (DEPOSITS)	DATE	BALANCE
			8 29 72	62.27
21.34 :15	125.00 .15	200.00	9 05	128.57 00
		125.00	9 11	71.43
75.00 :15			9 23	196.43
5.30 :15			9 25	121.28
.25			9 26	115.83
			9 27	115.58

NO OF DEBITS

5

NO OF CREDITS

2

DATE RENDERED 9 27 72 34

LAST AMOUNT ABOVE IS YOUR FINAL BALANCE ON DATE RENDERED

PLEASE INFORM US IMMEDIATELY OF ANY EXCEPTION(S) TAKEN BY YOU, GIVING FULL DETAILS AND YOUR ACCOUNT NUMBER

BY TO	A CHARGE MEMO	D AUTHORIZED DEBIT	M CREDIT MEMO	R RETURNED ITEM
AMOUNTS	B CREDIT MEMO (REFER TO ADVICES)	E AUTHORIZED CREDIT	(REFER TO ADVICES)	S SERVICE CHARGE
	C CERTIFIED CHECK (ENCLOSED OR OUTSTANDING)	F LIST	N INDIRECT DRAWING	T O.M. BAL. END

[Exhibit C]



ACCOUNT OF

**FIRST NATIONAL CITY BANK**  
 NEW YORK

ACCOUNT NUMBER

**JORDAN BROWN**  
**303 E 71 ST**  
**NEW YORK NY 1002**

63235456

23



PLEASE NOTIFY US OF ANY CHANGE IN YOUR ADDRESS OR TELEPHONE NUMBER

DEBITS (CHECKS)		CREDITS (DEPOSITS)		DATE	BALANCE
		BALANCE BROUGHT FORWARD		9 28 72	115.48
12.56	.15	40.00		10 02	155.58
75.00	.15			10 03	119.23
10.00	.15			10 06	44.08
		60.00		10 11	32.93
12.27	.15			10 16	93.93
7.28	.15			10 20	81.51
.255				10 25	71.78
				10 27	71.53

OF DEBITS 6

NO OF CREDITS 2

DATE RETURNED 10 27 72 92

LAST AMOUNT ABOVE IS YOUR FINAL BALANCE AND DATE RETURNED

PLEASE INFORM US IMMEDIATELY OF ANY EXCEPTION(S) TAKEN BY YOU OR BY THE BANK AND YOUR ACCOUNT NUMBER

BY TO	A. CHARGE MEMO	D. AUTHORIZED DEBIT	M. CREDIT MEMO	N. RETURNED TO BANK
MEMO'S	2. CREDIT MEMO (REFER TO ADVISES)	E. AUTHORIZED DEBIT	W. RETURNED TO BANK	O. RETURNED TO BANK
	3. CERTIFIED CHECK (IF CASHED OR OUTSTANDING)	F. OTHER	X. OTHER	P. OTHER

[Exhibit C]

**Affidavit in Connection With Motion for Summary Judgment****UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK }  
COUNTY OF NEW YORK }

ALBERT A. CARDONE, being duly sworn, says:

1. I am a member of the firm of Haskins & Sells, Certified Public Accountants, and I am fully familiar with the facts and circumstances hereinafter set forth.

2. This Affidavit is respectfully submitted in connection with the motion by defendant for an Order granting summary judgment.

3. As set forth in the Affidavit dated December 12, 1972 of John E. Muller, Assistant Vice President of First National City Bank (Para. 8), I received from defendant documents which purport to be copies of plaintiff's Checking Plus special checking account statements for July, August, September and October, 1972 and the Checking Plus Credit Agreement dated July 7, 1972 entered into between plaintiff and defendant.

4. In accordance with the request of First National City Bank, Haskins & Sells carried out certain procedures with respect to the documents described in 3 above and as described in detail in the Haskins & Sells report annexed hereto as Exhibit A. Such report also contains the following opinion of Haskins & Sells.

"In our opinion, based upon the work as described above, Exhibit 1 fairly summarizes the information set forth in the aforementioned documents furnished to us by you, and the computation of the amount of interest

*Affidavit for Summary Judgment*

as set forth in the Checking Plus Account statements for July, August, September and October 1972, summarized in Exhibit 1, is mathematically accurate and in accordance with the provisions of the aforementioned Checking Plus Credit Agreement, except as described in the Notes to Exhibit 1."

HASKINS & SELLS

By ALBERT A. CARDONE  
Albert A. Cardone

Sworn to before me this  
15th day of December, 1972.

JEANETTE SHORDT  
Notary Public

JEANETTE SHORDT  
Notary Public, State of New York  
No. 24-3646905  
Qualified in Kings County  
Certificate Filed in New York County  
Commission Expires March 30, 1973

FIRST NATIONAL CITY BANK  
 SUMMARY OF CERTAIN TRANSACTIONS  
 CONTAINED IN COPIES OF FIRST NATIONAL  
 CITY BANK'S STATEMENTS OF SPECIAL  
 CHECKING ACCOUNT NUMBER 63235456, IN THE  
 NAME OF A JORDAN BROWN, AND CHECKING  
 PLUS ACCOUNT NUMBER 85446983, IN THE  
 NAME OF A JORDAN BROWN, FOR JULY,  
 AUGUST, SEPTEMBER AND OCTOBER 1972  
 AND  
 ACCOUNTANT'S OPINION

• • •

HASKINS & SELLS

HASKINS & SELLS  
 CERTIFIED PUBLIC ACCOUNTANTS

TWO BROADWAY  
 NEW YORK 10004

December 15, 1972

First National City Bank,  
 399 Park Avenue,  
 New York, New York 10022.

Dear Sirs:

We have been requested by you to summarize certain information contained in copies of statements relating to Checking Plus Account Number 85446983, in the name of a Jordan Brown ("Checking Plus Account"), and Special Checking Account Number 63235456, in the name of a Jordan Brown ("Special Checking Account"), and to review for mathematical accuracy and compliance with the Checking Plus Credit Agreement bearing a signature "Jordan Brown", the amount of interest set forth in such Checking Plus Account statements for July, August, September and October 1972. In connection therewith you have

[Exhibit A]



*Summary of Certain Transactions*

furnished to us copies of monthly statements of the Checking Plus Account and Special Checking Account for July, August, September and October 1972 and a copy of the Checking Plus Credit Agreement bearing a signature "Jordan Brown" dated July 7, 1972.

We have not been requested to confirm and we have not confirmed from sources outside of First National City Bank any of the information set forth in the aforementioned statements and agreement. Also, you have not requested us to undertake, and we have not undertaken, any other auditing procedures with respect to the aforementioned documents. Accordingly, we make no representation as to such documents other than as stated below.

We have summarized certain information contained in the documents furnished to us by you relating to such Checking Plus Account and Special Checking Account statements for July, August, September and October 1972. Such summary is set forth in Exhibit 1 annexed hereto. We have read the aforementioned copy of the Checking Plus Credit Agreement and performed such mathematical tests of the computation of the amount of interest as set forth in such monthly statements of the Checking Plus Account and shown in summary on Exhibit 1 as we considered necessary in the circumstances.

In our opinion, based upon the work as described above, Exhibit 1 fairly summarizes the information set forth in the aforementioned documents furnished to us by you, and the computation of the amount of interest as set forth in the Checking Plus Account statements for July, August, September and October 1972, summarized in Exhibit 1, is mathematically accurate and in accordance with the provisions of the aforementioned Checking Plus Credit Agreement, except as described in the Notes to Exhibit 1.

Yours truly,

HASKINS & SELLS

[Exhibit A]

# FIRST NATIONAL CITY BANK

SUMMARY OF CERTAIN TRANSACTIONS CONTAINED IN COPIES OF FIRST NATIONAL CITY BANK'S  
STATEMENTS OF SPECIAL CHECKING ACCOUNT NUMBER 63235456, IN THE NAME OF A JORDAN BROWN,  
AND CHECKING PLUS ACCOUNT NUMBER 85446983, IN THE NAME OF A JORDAN BROWN,  
FOR JULY, AUGUST, SEPTEMBER AND OCTOBER 1972

Date of Entry	Special Checking Account .. Number 63235456 (Note 2) ..			Checking Plus Account .. Number 85446983 ..		Amount of Loan Principal Paid by Customer Outstanding		Amount of Interest ... (Note 1) ... Charged to Customer Paid by Customer	
	Debit	Credit	Balance (Overdraft)	Loans Made	Payments				
7/3/72 ...		\$800.00	\$ 800.00						
7/5/72 ...	\$500.30		299.70						
7/6/72 ...	100.15		199.55						
7/10/72 ..	50.15		149.40						
7/11/72 ..	120.45		28.95						
7/19/72 ..	25.15		3.80						
7/20/72 ..	125.15		(121.35)						
7/21/72 ..		125.15	3.80						
7/25/72 ..									
7/26/72 ..	4.00		(.20)						
7/27/72 ..	.25		(.45)						
8/1/72 ...	150.15		(150.60)						
8/3/72 ...		200.00	49.40	\$200.00		\$ 200.00			
8/14/72 ..	191.17		(141.77)						
8/15/72 ..	450.15	200.00	(391.92)	200.00		400.00			
8/16/72 ..	25.15	400.00	(17.07)	400.00		800.00			
8/17/72 ..		100.00	82.93	100.00		900.00			
8/22/72 ..	19.41		63.52						
8/25/72 ..								\$ 3.89	
8/28/72 ..	.25		63.27						
9/5/72 ...	25.15		38.12						
9/8/72 ...	166.69		(128.57)		\$ 41.39	\$ 37.50			\$ 3.89
9/11/72 ..		200.00	71.43	200.00		862.50			
9/12/72 ..		125.00	196.43			1,062.50			
9/25/72 ..	75.15		121.28					10.07	
9/26/72 ..	5.45		115.83						
9/27/72 ..	.25		115.58						
10/2/72 ..		40.00	155.58						
10/3/72 ..	36.35		119.23						
10/4/72 ..					54.35	44.28			10.07
10/6/72 ..	75.15		44.08			1,018.22			
10/11/72 .	10.15		33.93		100.00	100.00			
10/16/72 .		60.00	93.93			918.22			
10/17/72 .				50.00	50.00				
10/20/72 .	12.42		81.51			868.22			
10/25/72 .	9.73		71.78					9.65	

[Exhibit A]

## FIRST NATIONAL CITY BANK

Summary of Certain Transactions Contained in Copies of  
First National City Bank's Statements, etc.

## NOTES:

1. In accordance with the provisions of the Checking Plus Credit Agreement ("the Agreement") between First National City Bank ("the Bank") and a Jordan Brown, dated July 7, 1972, interest has been computed by applying a daily periodic rate of .03333% to the average of daily principal balances, as defined in the Agreement, multiplied by the number of days included in the period covered by the Checking Plus Account statement. In the computation of the average of daily principal balances, loans have been considered as outstanding from the date that the Bank records such loans in the customer's Checking Plus Account Statement. During the period covered by the above statements for July, August, September and October 1972, the Bank recorded such loans in the customer's Checking Plus Account statements from one to three days after the customer's Special Checking Account reflected an overdraft position. Had the Bank, as permitted by the Agreement, recorded such loans in the customer's Checking Plus Account statement on the same day that the customer's Special Checking Agreement showed an overdraft position, the amount of interest charged such customer would have been greater than the amounts shown above.

2. The computation of the amounts of interest shown above commenced with a loan by the Bank of \$200.00 recorded on August 3, 1972 for the overdraft position of \$150.60 shown in the customer's Special Checking Account statement on August 1, 1972. The Bank does not make loans for customers' overdrafts under \$5.01 for special checking accounts. A loan was not made for the overdraft of \$121.35 shown in the customer's Special Checking Account statement on July 20, 1972 nor did such statement show any amount of interest charge.

[Exhibit A-1]

## Plaintiff's Affidavit

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 (KTD)

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

JORDAN BROWN, being duly sworn, deposes and says:

1. I am the plaintiff in this action and make this affidavit in: (1) opposition to the motion for summary judgment of defendant; and (2) in support of the cross motion by plaintiff for summary judgment with respect to Counts I, III and IV of the complaint.

*A. Nature of Action*

2. I have a special checking account with defendant, FIRST NATIONAL CITY BANK ("CITIBANK"). Collateral thereto, I also have entered into a Checking Plus Credit Agreement (Exhibit "A", defs. mov. pap.) with CITIBANK. The Checking Plus account enables me to overdraw on my checking account to an agreed upon maximum amount. This amount was initially \$1,200.00. It was subsequently raised to \$2,000.00.



*Plaintiff's Affidavit*

3. The within action asserts the illegality of defendant's method of computing interest charges in connection with the said Checking Plus accounts. The complaint sets forth four causes of action, as follows:

- (a) Violation of the National Bank Act (12 U.S.C. Secs. 85 and 86) and the N.Y. Banking Law (Sec. 108, subd. 5) (Count I);
- (b) Breach of contract (Count II);
- (c) Money had and received (Count III);
- (d) Unjust enrichment (Count IV).

*B. Cross Motion for Summary Judgment.*

4. Plaintiff herewith moves for summary judgment as to Counts I, III and IV of the complaint, based on two specific practices of CITIBANK, towit, (1) imposing interest charges on amounts which are in only multiples of \$100.00, rather than on the actual overdrafts made, and (2) not deducting deposits to my checking account from the Checking Plus loan balances.

5. I have been informed that these practices are not followed by the other large New York banks, such as Chase Manhattan Bank, Manufacturers Hanover Trust Company, Bankers Trust Co. or Chemical Bank New York Trust Company, who also offer Checking Plus-type accounts.

6. My Checking Plus agreement (Exhibit "A", Defs. Mov. Pap.) provides that check overdrafts on my checking account "shall be treated by the Bank" as a loan "in multiples of \$100.00" and so charged against my Checking Plus account (1st para. thereof). It further provides, as follows:

"... that deposits to the above-mentioned checking account will not be applied to pay or pre-pay any

*Plaintiff's Affidavit*

charges hereunder for Loans, Finance Charges or Late Charges" (3rd para. thereof).

A review of the overdrafts in my checking account and a comparison of them with the amounts charged to my Checking Plus account, shows "forced" checking account balance as follows:

<u>Date</u>	<u>Actual Overdraft</u>	<u>Amount "Treated" as Loan</u>	<u>Forced Balances</u>
8/1/72 .....	150.60*	200.00	49.40
8/14/72 .....	141.77	200.00	58.23
8/15/72 .....	391.92	400.00	8.08
8/16/72 .....	17.07	100.00	87.93
	<u>\$701.36</u>	<u>\$900.00</u>	<u>\$198.64</u>

As shown above, loans by CITIBANK for the month of August 1972 resulted in interest charges being imposed not on the actual overdrafted\* amount of \$701.36, but on \$900.00. Interest charges are thereby imposed on an additional \$198.64.

7. Similarly, a "forced" balance is created, when deposits in the checking account are not deducted from the Checking Plus unpaid principal amount. For example, for the period 8/29/72 to 9/27/72, my monthly checking

---

\* Even this amount is not the actual amount of the overdraft, but rather the sum of the overdraft plus previous interest charges, check service charges, and monthly maintenance charges.

*Plaintiff's Affidavit*

account showed a deposit of \$125.00 and a closing balance of \$115.58 (Exhibit "C", Def's. Mov. Pap.) This deposit and the credit balance resulting thereby were not deducted from the previous overdraft loans, as would have been done by the other major New York banks offering overdrafting privileges comparable to the Checking Plus plan, except for this factor.

8. Defendant's concede that they "treat" overdrafts on requests for loans to the nearest \$100.00 multiple (Paras. "2" and "3", Def's. Rule 9(g) Statement). Their agreement so provides. The agreement further provides that deposits to my checking account shall not be deducted from unpaid balances in my Checking Plus account. No genuine issue of fact exists as to the use of these two practices. I am advised by counsel that under such circumstances, the illegality of the practices can be determined as a matter of law.

9. These practices have been criticized in a Ralph Nader Task Force Report entitled "Citibank", published in June 1971. A copy of pages 57-59 of that report is annexed hereto as Exhibit "A". A recent advertisement (N.Y. Post, December 18, 1972), annexed hereto as Exhibit "B", shows a continued use of the criticized practice.

*C. Opposition to Defendant's Summary Judgment Motion.*

10. Defendant denies that it compounds finance charges. A review of my Checking Plus account reveals to the contrary.

11. The monthly Checking Plus statement furnished to plaintiff by defendant for the period ending 8/25/72 (Exhibit "B", Def's. Mov. Pap.) shows that a finance charge of \$3.89 was imposed by defendant for this billing period and that the "unpaid principal" (upper left hand corner)

*Plaintiff's Affidavit*

in the account, as of the end of this billing period, was \$900.00.

12. The monthly Checking Plus statement for the following month's billing cycle, ending 9/25/72, (Ex. "B", Defs. Mov. Pap.) shows in the "previous balance" column thereof the amount of \$903.89. The "previous balance" I am informed, is the opening balance in the account and is the same as the "new balance", or closing balance, from the first billing period.

13. The opening balance of \$903.89, in this second billing period, represents \$900.00 of "unpaid principal" from the first period, according to defendant's terminology, and interest in the amount of \$3.89, from the first period.

14. According to defendant's supporting affidavit (Para. "5"—Muller), defendant computes interest by adding together the *principal* balances outstanding each day during the billing cycle, dividing the sum by the number of days in the billing cycle to arrive at the "average of daily principal balances". This "average" is then multiplied by the daily periodic rate and the number of days in the billing cycle.

15. Defendant's own monthly statements show that the daily *principal* balances used by defendant from the opening of the billing period was \$903.69 per day, until September 8, when further activity took place in the account, rather than the \$900.00 per day, "unpaid principal". This resulted in imposing interest on the \$3.89 interest from the prior billing period.

16. The interest charges for the second billing period shows that a finance charge of \$10.07 was imposed and that the "unpaid principal" (upper left hand corner) was \$1,062.50.



*Plaintiff's Affidavit*

17. The monthly Checking Plus statement (Ex. "B", Def's. Mov. Pap.) for the next month, for the period ending 10/25/72, shows in the "previous balance" (opening balance) column thereof, the amount of \$1,072.57. This amount, as the opening balance for this billing period, consists not only of "unpaid principal" but also the interest charged from the prior billing cycle, to wit, \$1,060.50 "unpaid principal", plus \$10.07 interest.

18. The Checking Plus agreement confirms this use of the compounding practice. It provides that the opening balance in the monthly Checking Plus statements include:

"The outstanding balance hereunder (principal, accrued finance charges and Late Charges), as of the last day of the Billing Cycle" (Para. "3", Ex. "A", Defs. Mov. Pap.)

19. My attorney informs me that a demand for answers to interrogatories and a notice to produce have been served upon defendant on December 1, 1972. Responses thereto have still not been made by defendant.

20. I verily believe that the complaint sets forth valid causes of action and that defendant has no valid defenses to this action; and that the causes of action, pursuant to Counts I, III and IV of the complaint, have been established sufficiently to warrant this Court, as a matter of law, to direct summary judgment in my favor.

WHEREFORE, it is respectfully requested that the defendant's motion for summary judgment be denied in its entirety, and that the cross motion of plaintiff, with respect

*Plaintiff's Affidavit*

to Counts I, III and IV of the complaint, be granted, together with costs and disbursements of the motions.

s/ .....  
JORDAN BROWN

Sworn to before me this  
6 day of February 1973.

s/ RICHARD M. WEINER

-----  
*Notary Public*  
No. 24-9578440  
Qualified in Kings County  
Commission Expires March 30, 1974

our history is best explained in that we got there the "firstest with the mostest." And, hell, when the competition got into the act, we didn't sit on our horns, no!<sup>59</sup>

Seven years passed before the other large banks followed suit. FNCB's jump on the competition helped the bank build up a large base of customers, many of whom return again and again when they need credit. Over 80% of FNCB's retail borrowers have had previous credit experience with the bank.<sup>60</sup>

Advertising is another important element in FNCB's retail operation. Most of FNCB's \$8,000,000 to \$9,000,000 advertising budget is directed to the retail market. In light of the failure of branch platform personnel to explain the bank's services, it would be appropriate for Citibank to use its advertising to inform people of the operation and costs of the bank's services. Citibank's ads, however, serve no such constructive purpose. Instead, the bank's ads, developed by two of the country's largest advertising agencies, J. Walter Thompson and Batten, Barton, Durstine & Osborn, utilize the well-known technique of making people believe that their dreams will come true if they just buy the product or service. Typical is FNCB's Checking Plus ad, depicting by cartoon a happy scene between a woman and a bank officer (also a woman):

CUSTOMER: First National City?

CITIBANKER: Yes.

CUSTOMER: You have that wonderful checking plus account?

CITIBANKER: Yes.

CUSTOMER: The one that lets me write checks up to \$5,000 bigger than my balance?

CITIBANKER: Yes.

[*Exhibit A*]

CUSTOMER: So if I see a divine pant-suit on sale, I can just write a check and the suit's mine?

CITIBANKER: Yes, yes.

CUSTOMER: Thanks to the checking plus I'll look absolutely devastating?

CITIBANKER: Yes.

CUSTOMER: Maybe meet the man of my dreams? Have a June wedding?

CITIBANKER: Yes, yes.

CUSTOMER: Could you be one of my bridesmaids?

ANNOUNCER: FIRST NATIONAL CITY HATES TO SAY NO.

Not only does Citibank fail to disclose the 12% Checking Plus interest rate in its ads, it omits this information from the descriptive brochure available at its branches.<sup>61</sup> In practice, Checking Plus costs more than 12%. The example cited in the bank's own brochure shows just how expensive Checking Plus can be:

Let's say you have \$250 in your checking account. You see a once-in-a-lifetime buy. Or you have an emergency. And you want to spend, say, \$300. Just write a check. Automatically. With no advance notice at all.<sup>62</sup>

As borrowings must be made in multiples of \$100, the customer, to overdraw the account by \$50 for that "once-in-a-lifetime buy," must borrow and pay interest on \$50 more than needed. Citibank thus earns an effective interest rate of 24% a year and still has the other \$50 to lend to another customer. Not all checking accounts have the overdraft privilege. Unless the customer has specifically opened a Checking Plus account, the bank will not honor checks exceeding the depositor's balance. Citibank imposes a \$3

[Exhibit A]



overdraft charge, which is not mentioned in the "Personal Checking Accounts" brochure.<sup>63</sup>

Because Citibank emphasizes the convenience of Checking Plus, customers assume that Checking Plus loans can be repaid as easily as they are incurred—by a routine deposit in the account. Such is not the case and Citibank's ads and brochures fail to outline the repayment procedure. In order to repay the overdraft, customers must fill out a separate form and mail it in or present it at a special window in the branch office. Although the repayment procedure is not inordinately complex, the failure to spell it out in the descriptive brochure confuses customers and costs them money, as the following statement by one customer shows:

When my daughter got sick a few months ago, I overdrew my Checking Plus account by \$100 in order to pay the doctor's bill. When I deposited my paychecks in the account, I assumed that the loan was repaid. When my first monthly statement arrived and indicated that I was still paying interest on the loan, I assumed that it was due to a lag between the time I deposited the money and the time the bank gave me credit for repaying the loan. When the next statement still showed the loan had not been repaid, I went into the branch and was told for the first time that Checking Plus loans must be repaid separately from normal deposits in the account. Nobody ever told me anything.

[*Exhibit A*]

# Citibank's Checking Plus

It's like carrying your bank around with you.

Checking Plus lets you write checks bigger than your balance. It's like writing yourself a loan. Anytime, anyplace.

Say you have \$250 in your checking account, and you write a check for \$300. No worry. We automatically loan you the money to cover it. Instantly.

Each time you write a check bigger than your balance, we transfer the needed money from your credit reserve to your checking account. In multiples of \$100. As you repay, the reserve builds up. So you can use it again and again.

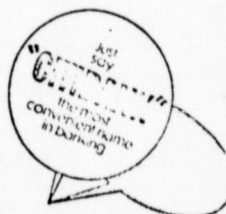
Checking Plus means you can have money for shopping, for bargains or emergencies. You apply just once. And, depending on your needs and ability to repay, we set up a cash reserve for you — from \$400 to \$5,000. Then you can forget about it, until you need it.

You can use Checking Plus as much or as little as you want. It doesn't cost you a cent until you use it.

Apply for Checking Plus at any of our more than 200 branches. They're easy to find. And, thanks to Checking Plus, almost as easy to carry around.



**FIRST NATIONAL CITY**  
the only bank your family ever needs



[Exhibit B]

## Accountant's Affidavit

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 (LFM)

STATE OF NEW YORK }  
COUNTY OF NEW YORK } ss.:

BERNARD FUCHS, being duly sworn, deposes and says:

1. I am a certified public accountant and a member of the accounting firm of KAUFMAN, GOLDNER & FUCHS, Certified Public Accountants. This affidavit is made in connection with motions for summary judgment made by the parties in this action.

2. At the request of plaintiff, I have reviewed the following material:

(a) The affidavit of JOHN E. MULLER, submitted on behalf of defendant, and the exhibits annexed thereto;

(b) The accounting data and "Accountant's Opinion", provided by the firm of HASKINS & SELLS, certified public accountants retained by defendant;

*Accountant's Affidavit*

(c) The monthly checking Plus & checking account statements furnished to plaintiff by defendant; and

(d) The affidavit of plaintiff.

3. It would appear from the material available at this time that interest is computed on amounts which include previously-imposed interest charges, as more particularly described in the plaintiff's affidavit.

4. In order to state with a certainty whether this practice is being followed, further information would be required. It would be necessary to examine the daily principal balances for each of the days in each of the periods involved and make calculations thereon. Such a task would require an examination of the documents reflecting each of these daily balances, together with the work sheets of defendant's accountant, indicating the manner and nature of the calculations of interest and the amounts upon which they are charged.

5. Accountants for defendant certify merely to the mathematical accuracy of the figures they have examined. No opinion is expressed by them as to whether there is a compounding of finance charges, whether finance charges have been imposed on amounts greater than "unpaid principal", or whether interest rates as a result of such practice exceed 1% per month.

6. I express no opinion as to whether defendant's method of calculating interest charges comply with the provisions of the Checking Plus Credit Agreement or the applicable statute. Such an opinion would be legal in nature and not a subject appropriate for the accountants of the parties herein.



*Accountant's Affidavit*

7. In accordance with the foregoing, it is my opinion, based on the accounting data now available, that:

- (a) Defendant compounds interest charges;
- (b) Defendant charges the Checking Plus loan account, not on the actual amount of an overdraft, but only on multiples of \$100.00;
- (c) Defendant does not deduct deposits to the checking account from the Checking Plus loan balances.
- (d) The foregoing practices would result in effective interest rates higher than 1% per month.

KAUFMAN, GOLDNER & FUCHS

By s/ BERNARD FUCHS  
Bernard Fuchs

Sworn to before me this  
6 day of February, 1973.

s/ SHELDON V. BURMAN

-----  
*Notary Public*  
SHELDON V. BURMAN  
Notary Public, State of New York  
No. 24-(NOT LEGIBLE)  
Qualified in New York County  
Commission Expires March 30, 1974

*Statement Pursuant to Rule 9(g)*

Pursuant to Rule 9(g) of the General Rules of this Court, plaintiff sets forth as follows:

*A. As to Defendant's Motion for Summary Judgment.*

Plaintiff opposes defendant's motion for summary judgment, as he contends there are genuine issues of fact requiring plenary trial, as to the following issues:

1. Whether defendant exacts interest charges on previously-imposed interest charges, to wit, "compounding"?
2. Whether defendant exacts interest charges on amounts greater than the "unpaid principal amount" required by N.Y. Banking Law, Sec. 108, subd. 5?
3. Whether defendant exacts interest charges in excess of the 1% per month mandated by N.Y. Banking Law, Sec. 108, subd. 5?

*B. As to Plaintiff's Cross Motion for Summary Judgment*

Plaintiff submits that no genuine issues of fact are presented with respect to the following issues:

1. Defendant exacts interest charges on overdrafts in multiples of \$100.00, rather than on the exact amount of the overdrafts.
2. Deposits made by plaintiff to his checking account are not deducted from loan balances in his Checking Plus account.

Dated: New York, N. Y.

February , 1973.

.....  
Sheldon V. Burman  
Attorney for Plaintiff  
21 East 40th Street  
New York, N. Y. 10016

## Opinion

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516  
No. 39990

APPEARANCES:

SHELDON V. BURMAN, Esq.  
Attorney for Plaintiff

SHEARMAN & STERLING, Esqs.  
Attorneys for Defendant

By John E. Hoffman, Jr., Esq.  
Joseph T. McLaughlin, Esq.  
*Of Counsel*

KEVIN THOMAS DUFFY, D.J.

This is one of two actions brought simultaneously by customers\* of the defendant First National City Bank

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\* The plaintiff in each case has moved for a class action determination but the parties in both cases have stipulated to postpone consideration of the class action motion until after the court has disposed of the motion for summary judgment.

*Opinion*

challenging the bank's method of calculating interest on Checking Plus accounts. The defendant has moved for summary judgment in both cases; this Court denied one of the motions, finding disputed issues of fact. *Rosenspan v. First National City Bank*, 72 Civ. 4515 (S.D.N.Y., filed Aug. 23, 1973).

The essence of plaintiff's claim in this case is that the defendant's method of calculating interest on amounts lent to him under the Checking Plus agreement violates the National Bank Act, 12 U.S.C. § 85 and the New York Banking Law § 108(5), in three respects: first, plaintiff challenges defendant's practice of using multiples of one hundred in advancing funds to Checking Plus customers instead of the exact amount indicated by the customer's check; second, plaintiff claims that the defendant charges interest on interest; and third, that it charges interest on service charges. Plaintiff claims that the latter two practices also constitute violations of the Checking Plus agreement which allows interest to be charged only on "the amount of credit in use." In its motion for summary judgment the defendant denies using the latter two practices and claims that its practices of using multiples of a hundred is permitted by both State and federal law.

Jurisdiction is properly invoked pursuant to 28 U.S.C. § 1337 and 28 U.S.C. § 1355. Section 1337 confers on the district courts "original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce . . ." The National Bank Act clearly regulates commerce. Section 1355 confers exclusive jurisdiction "of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture . . . incurred under any Act of Congress." The plaintiff is suing for recovery of the penalty provided by Section 86 of the National Bank Act. In addition, the state claims stem from a "common



*Opinion*

nucleus of operative fact", *United Mine Workers v. Gibbs*, 388 U.S. 715, 725 (1966), and thus meet the test for pendent jurisdiction.

Following the defendant's motion for summary judgment, the plaintiff cross-moved for partial summary judgment based on the defendant's practice of charging interest on multiples of \$100. The plaintiff opposes the defendant's motion for summary judgment on the questions of compounding interest and charging interest on service and maintenance charges, claiming that these questions raise factual issues which should not be resolved on the basis of conflicting affidavits. Finally, as part of his cross-motion plaintiff raises a new issue, claiming that both state and federal statutes are violated by the defendant's failure to credit deposits by plaintiff to his checking account as repayment of loans advanced pursuant to the Checking Plus agreement. With the exception of the question whether the defendant charges interest on service charges, all of these issues can be disposed of by summary judgment.

Plaintiff's first argument centers on the question of whether the charging of interest on multiples of a hundred rather than on the exact amount of the overdraft violates state and federal law. The National Bank Act, 15 U.S.C. § 85 permits a national bank to charge interest up to the maximum rate permitted by the laws of the state where it is located. Here the applicable law is Section 108(5) of the New York Banking Law, which provides that:

"5.(a) A bank or trust company which operates a personal loan department pursuant to paragraph (a) of subdivision four hereof may establish credits under written agreements with borrowers, pursuant to which one or more loans or advances to or for the account of a borrower may be made from time to time, by means

*Opinion*

of honoring one or more checks or other written orders or requests of the borrower and may charge interest on such loans and advances at the rate permitted by paragraph (b) of this subdivision, provided such loans and advances comply with the provisions of this subdivision."

" (b) Such agreement may provide for interest on the unpaid aggregate principal amount of such loans and advances from time to time outstanding at a rate not in excess of one per centum per month . . . reckoned on each loan or advance from the date thereof . . ."

Under Section 108(5)(a) the bank may charge interest at the rate permitted by Section 108(5)(b) only on loans or advances made "by means of honoring one or more checks on other written orders or requests of the borrower." Under the Checking Plus agreement, if a customer writes a check for which there is an insufficient balance in his checking account, the bank does not merely honor it, but rather advances funds from his Checking Plus account in the multiple of a hundred needed to cover the overdraft. For example, if a customer with a balance of zero wrote a check for \$105, the bank would transfer \$200 from his Checking Plus account to his checking account. The \$105 would be used to cover the check and his checking account would then show a positive balance of \$95. But he would pay interest on \$200 until it was repaid. In this case the plaintiff wrote four checks on credit during August 1972, which totalled \$701.36, but the bank advanced, and charged interest on, a total of \$900. The plaintiff does not claim that this practice violates the Checking Plus agreement; indeed, it is clearly spelled out therein. However, the practice cannot be reconciled with the statutory requirement that loans be made "by means of honoring one or more checks or other written orders or requests of the borrower." Advancing funds in

*Opinion*

multiples of a hundred dollars does not constitute honoring a check.

Defendant argues that the differences between the amounts of plaintiff's overdrafts and the multiples of one hundred dollars advanced by the defendant were in fact loans, and that therefore the plaintiff has been charged interest only on amounts actually loaned. Defendant's argument implies that it is irrelevant whether or not the plaintiff ever used the entire amount loaned, since the defendant placed the money at plaintiff's disposal by transferring it from his Checking Plus account to his special checking account and thereby earned the right to charge interest on it. Yet under the Checking Plus agreement the money was already at the plaintiff's disposal as credit in the Checking Plus account. It is difficult to see how the mere transfer of money from one account to another can create a right to charge interest on it before it is actually withdrawn by the borrower. Furthermore, by logical extension, the defendant's argument could be used to justify transferring money in multiples of one thousand, if agreed upon by a customer, and charging interest on \$1,000, although the customer had only spent \$50. In view of the strict public policy underlying usury laws and the carefully drawn language limiting the imposition of interest to amounts loaned "by means of honoring one or more checks or other written orders or requests of the borrower," the defendant's argument is not persuasive.

For these reasons the plaintiff's cross-motion for summary judgment *on this issue is granted.*

The questions next to be considered are whether the defendant charges interest on interest or interest on service charges. These factual questions need not be resolved on conflicting affidavits because the defendant has supplied records of the plaintiff's special checking and Checking Plus accounts. These records, whose accuracy is undis-



*Opinion*

puted, show that the defendant has not charged interest on interest. Had it done so, the interest charged for September 1972 would have been two cents higher, and that charged for October 1972 three cents higher, than the charges actually imposed. The question whether the defendant charges interest on service charges, however, cannot be resolved until the defendant discontinues its practice of charging interest on multiples of a hundred dollars rather than the amount of the overdraft. Summary judgment on this issue must therefore be denied.

The final issue to be resolved on this motion is that of repayment. Under the Checking Plus agreement, advances or loans from the Checking Plus account to the special checking account may not be repaid merely by depositing money in the special checking account. Rather, such payments must be made to the Checking Plus account, "accompanied by a properly completed payment ticket (enclosed with the monthly Checking Plus Statement) or by any other properly completed form of notice of prepayment authorized by the Bank . . ." Thus it is possible for a customer to have a positive balance in his special checking account larger than the debt in his Checking Plus account and still pay interest on the entire debt.

The plaintiff claims that this practice violates Sections 108(5)(d) and (f) of the New York Banking Law and results in his paying interest higher than the maximum allowable rate. Section 108(5)(d) states:

"(ii) The borrower may at any time prepay the amount owing in part or in full, with interest to the date of prepayment."

Section 108(5)(f) provides in relevant part that:

"(f) No bank or trust company shall require a borrower to keep any sum on deposit, or to make deposits



*Opinion*

in lieu of regular periodic installment payments, or to do or refrain from doing any other act which would entail additional expense or sacrifice, as a condition precedent to the entering into of the agreement or granting of a loan or advance under the authority of this subdivision . . ."

Notwithstanding the plaintiff's objections, neither of these sections is contravened by the payment provisions of the Checking Plus agreement. There is nothing in the agreement or the defendant's practice to prevent a customer from making payments to the Checking Plus account as opposed to the special checking account. Although admittedly customers might find it more convenient to repay their loans by making deposits in their checking accounts rather than having to make special payments to their Checking Plus accounts, the statute does not confer any legal right to make such convenience. The requirement that payments be made to one account rather than the other does not "entail additional expense or sacrifice" of the kind referred to in the statute. The defendant is therefore entitled to judgment on this final issue.

Settle order on notice.

/s/ KEVIN THOMAS DUFFY  
U. S. D. J.

Dated: New York, New York  
November 7, 1973.

## Order

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JORDAN BROWN and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 KTD

Defendant, by its attorneys Shearman & Sterling, having moved for an Order, pursuant to Rule 56(b) of the Federal Rules of Civil Procedure, granting summary judgment to defendant; and

Plaintiff, by his attorney Sheldon V. Burman, having cross-moved for an Order, pursuant to Rule 56 of the Federal Rules of Civil Procedure, granting summary judgment to plaintiff with respect to Counts I, III and IV of the complaint; and

Said motions having come on before this Court on February 9, 1973; John E. Hoffman, Jr. and Joseph T. McLaughlin, of counsel, Shearman & Sterling, attorneys for defendant, submitting on defendant's behalf; and Sheldon V. Burman, attorney for plaintiff, submitting on plaintiff's behalf; and

After due consideration and deliberation thereon, and upon the Opinion herein, dated November 7, 1973; it is hereby

*Order*

ORDERED, (1) that defendant's motion for summary judgment be and it hereby is granted dismissing that portion of plaintiff's claim as alleges (Complaint, para. 14(b)) that in computing interest with respect to Checking Plus Accounts, interest charges are compounded by defendant, *i.e.*, that defendant computes and charges interest on interest; and it is further

ORDERED, (2) that defendant's motion for summary judgment dismissing that portion of plaintiff's claim as alleges (Complaint, para 14(c)) that interest on Checking Plus Accounts is computed and charged upon amounts greater than the "unpaid principal amount" to the extent that such amount is alleged to include service charges or check maintenance charges, be and it hereby is denied, there being unresolved questions of fact relating to such allegations. This denial is without prejudice to renewal of the motion by defendant for summary judgment on this issue, subsequent to appropriate discovery specifically relating to that issue; and it is further

ORDERED, (4) that plaintiff's cross-motion for summary judgment with respect to Counts I, III and IV of the complaint, to the extent that the plaintiff's claims therein are based upon defendant's alleged failure to credit deposits by plaintiff to his special checking account as repayments of loans advanced thereto from plaintiff's Checking Plus Account, be and it hereby is denied, and defendant's motion for summary judgment dismissing the complaint, to the extent that it includes such claims and allegations be and it hereby is granted; and it is further

ORDERED, (5)(a) that plaintiff's motion for partial summary judgment upon that portion of plaintiff's claim as alleges (Complaint, para. 14(a)) that interest is charged upon amounts transferred from plaintiff's Checking Plus

*Order*

Account to his special checking account in multiples of \$100, be and it hereby is granted;

ORDERED, (5) (b) that defendant be and hereby is enjoined and restrained from charging interest on the amount by which such multiple or multiples exceed the aggregate amount of the overdraft checks drawn by plaintiff during the respective billing cycle; and it is further

ORDERED, (5) (c) that summary judgment be and the same hereby is granted to plaintiff in such amount as shall be found to be due him as damages, plus such penalties as may be found due, and for such other relief as may be found to be just and proper; and it is further

ORDERED, (6) that defendant's motion for summary judgment be and the same hereby is denied in all other respects; and it is further

ORDERED, (7) that plaintiff's cross-motion for summary judgment be and the same hereby is denied in all other respects.

KEVIN THOMAS DUFFY  
U. S. D. J.

Dated: New York, New York  
January 28, 1974.



## Notice of Appeal

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORKJORDAN BROWN and all others  
similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 KTD

NOTICE IS HEREBY GIVEN that defendant First National City Bank hereby appeals to the United States Court of Appeals for the Second Circuit from so much of the Order granting summary judgment and an injunction herein, dated January 28, 1974 (Hon. Kevin Thomas Duffy, J.), as grants plaintiff summary judgment with respect to, and enjoins defendant from, the charging of interest on the amount by which the multiple or multiples of \$100 exceed the aggregate amount of the overdraft checks drawn by plaintiff during the respective billing cycles, which Order was entered in this action on the 29th day of January, 1974.

Dated: New York, New York  
January 30, 1974

TO:

JORDAN BROWN  
c/o Sheldon V. Burman  
21 E. 40th Street  
N. Y., N. Y. 10016  
Clerk Court of Appeals  
for the Second Circuit

SHEARMAN &amp; STERLING

By JOHN E. HOFFMAN, JR.  
A Member of the Firm  
Attorneys for Defendant  
First National City Bank  
53 Wall Street  
New York, New York 10005

**Notice of Cross Appeal**  
**UNITED STATES DISTRICT COURT**  
**SOUTHERN DISTRICT OF NEW YORK**

JORDAN BROWN and all others  
 similarly situated,

Plaintiff,

—against—

FIRST NATIONAL CITY BANK,

Defendant.

72 Civ. 4516 KTD

NOTICE IS HEREBY GIVEN that plaintiff, JORDAN BROWN, hereby appeals to the United States Court of Appeals for the Second Circuit from so much of decretal paragraph number "4" of the Order of the United States District Court for the Southern District of New York, dated January 28, 1974 (Hon. Kevin Thomas Duffy, J.), which order was entered by the Court below on the 29th day of January, 1974, as denies injunctive relief with respect to plaintiff's cross motion for summary judgment.

Dated: New York, New York  
 February 27, 1974.

s/ .....

SHELDON V. BURMAN

Attorney for Plaintiff

Office and P.O. Address

21 East 40th Street

New York, New York 10016

TO:

SHEARMAN & STERLING

Attorneys for Defendant

53 Wall Street

New York, N. Y. 10005

Copy received \_\_\_\_\_

April 9 1974

Sheldon & Burman \_\_\_\_\_

Attorney for plaintiff.